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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE BROOKLYN UNION GAS COMPANY,

Petitioner,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Respondent,

and

THE CITY OF NEW YORK,

Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Did the New York State Court of Appeals deprive the Petitioner of due process of law under the Fifth and Fourteenth Amendments when, after holding that reproduction cost new less depreciation ("RCNLD") was the exclusive measure of value for tax purposes, it subverted its own ruling by totally ignoring the fact that the only credible evidence of RCNLD submitted at the trial and contained in the record on review was that of the Petitioner and denying Petitioner any opportunity for a hearing and ruling on the merits of that evidence by summarily dismissing the petition? Despite Petitioner's motion for reargument, which again expressly drew the Court's attention to the existence in the record of Petitioner's extensive RCNLD evidence and the serious Constitutional issue raised by the Court's summary disposition, the Court took no action to address either matter, thus effectively denying Petitioner any opportunity for a ruling on the merits of the case.

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Record Citation

This Petition involves the Constitutionality of the Court of Appeals' summary dismissal of Petitioner's petition for judicial review of the State's tax assessment of its special franchise property. The transcripts and exhibits of the trial court were certified to the Court of Appeals as Volumes I and II of the Record On Appeal, and are cited in this Petition as follows:

> "R." refers to the page in the transcript of the trial court proceeding.
>
> "Ex." refers to the Petitioner's exhibits received in evidence at the trial.

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THE BROOKLYN UNION GAS COMPANY,

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STATE BOARD OF EQUALIZATION AND ASSESSMENT,

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THE CITY OF NEW YORK,

Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Opinions Below

The opinion of the New York Court of Appeals is reported at 65 N.Y.2d 472, 492 N.Y.S.2d 598 (1985) and is set forth in Appendix A hereto.[1] The opinion of the intermediate appellate court—New York Supreme Court, Appellate Division, Third Judicial Department—is reported at 101 A.D.2d 414, 477 N.Y.S.2d 693 (1984) and is set forth in Appendix B hereto. The opinion of the trial court—Supreme Court, Albany County—dated May 24, 1983, was not reported and is set forth in Appendix C hereto.

[1] In addition to the parties listed in the case caption, the following parties filed briefs *amici curiae* in the Court of Appeals proceeding: the New York State School Boards Association, Nassau County, Westchester County, certain Westchester municipalities supporting the position of the SBEA, and the New York State Public Service Commission in support of the position of Brooklyn Union.

Jurisdiction

This case involves a Constitutional challenge to a decision of the New York Court of Appeals on the ground that the Court's disposition of the case has violated Petitioner's right to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The New York Court of Appeals arbitrarily dismissed the Petitioner's petition for judicial review of its special franchise property assessment for the year 1980-81 and thus denied Petitioner any opportunity for a judicial ruling on the merits of that asssessment. This action was taken despite ample record evidence before the trial court which was entirely consistent with the Court of Appeals' conclusion as to the proper methodology of valuation. The Court of Appeals, on Petitioner's motion for reargument, took no action to redress its unconstitutional denial of a hearing on the merits of the assessment, dismissing Petitioner's motion without opinion.

The Court of Appeals' final judgment was dated and entered on August 1, 1985, and is set forth in Appendix D. The Court of Appeals in a decision without opinion dated October 8, 1985, denied Appellant's motion for reargument. A copy of this decision is set forth in Appendix E.

Jurisdiction to review the final judgment of the Court of Appeals in this case is conferred on this Court by 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

The pertinent Constitutional and statutory provisions are set forth in Appendix F hereto.

Statement of the Case

Petitioner, The Brooklyn Union Gas Company[2] ("Brooklyn Union"), is a gas utility serving energy needs of over

[2] Petitioner has no parent corporations. It has the following non-wholly owned subsidiary corporations: Honeoye Storage

(*footnote continued on following page*)

four million consumers in the counties of Kings, Queens, and Richmond in New York City. This Petition arises out of the dismissal by the New York Court of Appeals of Brooklyn Union's petition for review of the tax assessments of its special franchise property for the 1980-81 year. The assessments were made by the New York State Board of Equalization and Assessment ("SBEA"). The SBEA first made tentative assessments of Petitioner's special franchise property; Petitioner challenged these tentative assessments at the administrative level, whereupon the SBEA increased the tentative assessments.

Brooklyn Union then initiated this proceeding pursuant to Article 7 of the New York Real Property Tax Law ("R.P.T.L.") for judicial review of those final assessments. A special franchise is defined for purposes of assessment and taxation as including the value of tangible property (mains, pipes, tanks and appurtenances for conducting gas) "situated in, under, above, upon or through any public street, highway, water or other public place in connection therewith." N.Y. R.P.T.L. § 102(17) (McKinney 1984).

The trial court and a unanimous Appellate Division held that Brooklyn Union's special franchise property had been over-assessed in the amount of approximately $106 million. The New York Court of Appeals reversed both the trial court and the appellate court.[3] It held that the exclusive method of valuing this special franchise property was an appraisal method known as reproduction cost new less depreciation ("RCNLD"). The Court then dismissed

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(footnote continued from preceding page)
Corporation and Boundary Gas Corporation. It has the following affiliated corporations: Tri-State Well Service, Inc., BHP Energy, Inc., and Fuel Resources Gathering Inc. It has no other affiliates.

[3] The Court of Appeals coupled this decision with another SBEA appeal from a separate decision in a different case. *National Fuel Gas Distribution Corp. v. SBEA*, 103 A.D.2d 187, 479 N.Y.S.2d 902 (3d Dept. 1984). That case involved a holding

(footnote continued on following page)

the petition, entirely ignoring the fact that the only credible evidence of RCNLD in the case was that introduced at the trial by the Petitioner through competent witnesses. This evidence showing value by the RCNLD method was offered by the Petitioner in great detail through the appraisal of Petitioner's expert and his testimony on direct examination. It was the subject of cross-examination by the attorneys for the SBEA and The City of New York, which appeared as intervenor-respondent. In ignoring this evidence and summarily dismissing the petition, the Court of Appeals in effect subverted its own holding, denied Petitioner any opportunity for a factual ruling on the merits of the property assessment, and deprived the Petitioner of due process of law in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution.

That its arbitrary dismissal of the petition was unconstitutional in light of the fact that the record demonstrated amply Petitioner's submission of evidence to the trial court in full compliance with the Court of Appeals' view of the law, was specifically called to the Court's attention by Petitioner's motion for reargument which was made shortly after the Court's summary dismissal of the case. The response from the Court was a further summary denial. There was no acknowledgment that Petitioner had pro-

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(*footnote continued from preceding page*)
company with two primary subsidiaries—a multi-state retailer of natural gas serving customers in Pennsylvania, Ohio and 12 counties in the far Western part of New York, and a multi-state wholesaler of natural gas in the same area. In contrast, Brooklyn Union is a local operating company, supplying gas to customers in only three counties in the City of New York. The course of the trial was also entirely different in that case which involved ten separate proceedings before a different judge. There, there was testimony by SBEA as to its method of assessment; here, there was none; there, the trial judge dismissed the petition; here, the trial judge upheld the petition and made substantial reductions in the assessment. Despite major differences between the two cases, the Court of Appeals joined them for argument and decision.

vided a full RCNLD appraisal; there was no explanation of any kind for the denial of the motion; nor was any reason provided for the arbitrary dismissal of the petition and the denial to Petitioner of any opportunity for a judicial ruling on the merits of its property assessment. The Court apparently continued incognizant of its own inherent inconsistency in setting up RCNLD as the exclusive measure of value while disregarding the Petitioner's extensive evidence before the trial court in developing that measure.

No evidence whatsoever was offered by the SBEA, the assessing agency. The trial court found that no weight could be given to the evidence offered by the intervenor, The City of New York.

I. The Opinion of the Court of Appeals

(1)

The Court of Appeals went astray, at the very outset of its opinion, by a simplistic and erroneous statement of the issue in the case. The issue was not, as the Court stated, between reproduction cost and capitalization of income. The real issue is between RCNLD as the exclusive measure of value and the universally-accepted standard of market value, which is defined as the price that a willing purchaser would pay and a willing seller would accept for the property.

The Petitioner's expert proceeded in the trial court on the basis that market value was the measure of "full value," universally approved by the courts and the appraisal profession. In determining the market value, the Petitioner's expert investigated the three standard approaches to market value: (1) comparable sales data; (2) original cost and reproduction cost; (3) capitalization of income. Because of the paucity of sales of similar property, the Petitioner's expert employed cost data (including reproduction cost) and earnings data. He made extensive

investigations of both types of data and rendered a detailed appraisal report which was received in evidence. By ignoring the Petitioner's expert's punctiliously-prepared report of RCNLD, the Court of Appeals contradicted its own holding accepting RCNLD as the exclusive measure of value and deprived the Petitioner of due process of law in the form of a judicial ruling on the merits of its property assessment under the RCNLD standard embraced by the Court.

(2)

The Court of Appeals' opinion stated:

> The issue presented on these appeals is whether the special franchise properties of the Brooklyn Union Gas Company, and those of National Fuel Gas Distribution Corporation and National Fuel Gas Supply Corporation, are specialty property, to be valued for special franchise assessment and taxation purposes by the reproduction-cost-new-less-depreciation (RCNLD) method, or whether a capitalization-of-income method of valuation is an acceptable method of valuation of such property. The Appellate Division, in both cases, has held that the petitioners' special franchise properties are not "specialty properties" and therefore that the capitalization-of-income method is an acceptable method of assessing the value of special franchise property in New York State. We disagree and therefore reverse the Appellate Division orders appealed from.

65 N.Y.2d at 472, 492 N.Y.S.2d at 600.

The opinion of the Court of Appeals then summarized a portion of the record on the trial as follows:

> At the trial of the Brooklyn Union proceeding, SBEA did not file an appraisal report or offer any testimony through its personnel as to the

valuation method employed. Rather, it relied on the appraisal report and testimony of an expert employed by the City of New York (the City had been granted leave to intervene). The trial court rejected his testimony, finding that he lacked sufficient background and experience to qualify as an expert appraiser of special franchise property. The court also rejected his appraisal report because it failed to comply with the rules of the Appellate Division as to form and content. The court concluded that the record was barren of any evidence of the appraisal method employed by SBEA in arriving at its valuations. The court noted that the City's expert used the RCNLD method, but that the value he arrived at was more than $100,000,000 higher than that arrived at by SBEA. The court concluded that he did not perform the assessments for SBEA.

The court accepted the expert opinions of the petitioner's witnesses and their valuation of the special franchise property, which appraisals and valuations were arrived at through capitalization-of-income and original-cost-less-depreciation (rate base) appraisal methods. The court accepted the capitalization-of-income method of valuation as "a legitimate method for valuing a special franchise *** especially when the only evidence in the record is that the system, if reproduced, would not be reproduced in its present form." The court determined the final equalized values of Brooklyn Union's special franchise property, located in Kings, Queens and Richmond Counties, for the tax year 1980-81, to be $83,336,183, $45,511,625 and $25,990,355 respectively. These valuations were significantly lower than the final assessments of SBEA.

65 N.Y.2d at 483, 492 N.Y.S.2d at 601.

The Court's opinion is conspicuously bereft of any mention of Petitioner's full-blown RCNLD appraisal and the evidence submitted by Petitioner regarding RCNLD.

(3)

The affirmance of the trial court by the Appellate Division was summarized by the Court of Appeals as follows:

> The Appellate Division affirmed, concluding that the "capitalization of income method used [by petitioner's experts] herein provides the most accurate method of determining value", and that rejection of the RCNLD method of appraisal was proper since "the system would never be reproduced in its present form but would be replaced with a new completely modern system". The court found that, in the parlance of an expert real estate appraiser, "[r]eproduction means replacement with an exact model" which "[i]n this case *** is totally unrealistic". Thus, the court held that Brooklyn Union's franchise property "could not be considered a specialty since it is unreasonable to conclude that the facility could be replaced on an economic basis." The court noted, moreover, that it would "reach the same result even if the facility were considered a specialty".

65 N.Y.2d at 483, 492 N.Y.S.2d at 601.

(4)

The Court of Appeals concluded that "the proper method of valuing their tangible property is by RCNLD. . . . " *Id.* at 488, 492 N.Y.S.2d at 604.

The Court totally ignored the Petitioner's RCNLD evidence developed in the trial court, choosing instead to render judgment as follows: "The order of the Appellate

Division in *Brooklyn Union Gas Co.* should be reversed, the petition dismissed and SBEA's determination reinstated." *Id.*

In light of the fact that the only credible evidence of RCNLD introduced at the trial was that introduced by the Petitioner, the summary dismissal of the petition was in direct contradiction of the Court's holding that the proper method of valuation was RCNLD. The Court's arbitrary dismissal of the petition was thus in clear violation of the due process clauses of the Fifth and Fourteenth Amendments. It denied to Petitioner any opportunity for a judicial determination on the merits of its property assessment valued by the RCNLD standard embraced by the Court of Appeals.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. Petitioner's Constitutional Right to Due Process was Violated by the Court of Appeals' Dismissal of the Case Despite Petitioner's Ample Competent Record Evidence on the Proper Method of Valuation.

(1)

As permitted by New York statutory law, Petitioner at trial presented alternate theories of overvaluation,[4] among them, capitalization of income and RCNLD. The trial court and the Appellate Division chose to focus upon capitalization of income as the appropriate appraisal method for valuing Petitioner's property. The Court of Appeals held that RCNLD was the only proper method.

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[4] Section 3014 of the New York Civil Practice Law and Rules permits alternate theories to be presented and provides that "*[s]eparate causes of action* or defenses shall be separately stated and numbered and may be stated regardless of consistency. Causes of action or defenses may be *stated alternatively or hypothetically.*" N.Y. C.P.L.R. §3014 (McKinney 1974) (emphasis added).

Petitioner has never abandoned or renounced the RCNLD evidence which it presented at the trial.[5]

(2)

The Court's egregious error apparently resulted from its beguilement by the label "specialty" which it attached to Petitioner's special franchise property. The Appellate Division held that Petitioner's special franchise property was not a "specialty" and that even if it were to be so considered, capitalization of earnings was an appropriate measure of value. The Court of Appeals failed to grasp the fact that so-called "specialty" properties are of two kinds: (1) those that are designed for profit and are revenue-producing and (2) those that are designed for non-profit purposes and produce no revenue. In valuing the former, the revenue they produce is the chief determinant of value. The latter, which include such properties as churches, synagogues, schools, and museums, are not operated for profit; there is no revenue to be considered and so, *faute de mieux*, the appraiser must, of necessity, fall back on a cost standard, like RCNLD.

The Court of Appeals in effect created a conclusive and irrebuttable presumption that once a property was denominated a "specialty" that designation ruled out any proof of its value other than reproduction cost new less depreciation. This Court has long disfavored irrebuttable presumptions, *Vlandis v. Klein*, 412 U.S. 441 (1973), whether the irrebuttable presumption is created by statute or by judicial fiat. *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 678 (1930). In this case, the Court went far beyond the irrebuttable presumption doctrine. It not only set up RCNLD as the

[5] By the RCNLD method, Petitioner's expert, Mr. Breitling found overvaluation of approximately $97 million before economic obsolescence which is close to his $106 million overvaluation derived from the capitalization of income method which the trial court and lower appellate court favored. Ex. 17.

one only and exclusive method of valuation, it did not even acknowledge that Petitioner had detailed credible evidence of RCNLD which had neither been rejected nor even reviewed in the record.

In other words, on the trial, the Petitioner Brooklyn Union presented for the Court's consideration two methods of valuation: RCNLD and capitalization of income; the two methods and the two estimates could be considered either as alternatives of each other or as supplements to each other. There were no opposing methods or estimates presented by the respondents which the trial court and the Appellate Division found credible. Under the circumstances, and in the state of the record, the Court of Appeals should have affirmed. If the Court of Appeals found some error either in emphasis or consideration by the fact-finding lower courts, it should have reversed and remanded for further consideration. But when it averted the testimony as to RCNLD which the Petitioner had presented and summarily dismissed the petition, it not only committed an error under state law, it also committed an outright violation of the due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.

Petitioner's brief on its motion for reargument specifically called to the attention of the Court of Appeals the record evidence presented by the Petitioner on the RCNLD method espoused by the Court of Appeals. Petitioner placed in evidence (Exhibit 17) an appraisal which included a comprehensive RCNLD analysis. The RCNLD testimony of Petitioner provided full detail and explanation of an RCNLD valuation, the same approach which the Court of Appeals held to be the only proper approach to value. It was offered by Mr. Julius Breitling, a vice-president of Ebasco Services, Inc., a mechanical engineer as well as a public utility appraiser, who was characterized by the Appellate Division as a recognized expert in the field of public utilities and as "eminently qualified." He

testified extensively on his detailed development of an RCNLD estimate of value and was exhaustively cross-examined on it by counsel for both respondents.

This acknowledged valuation expert did not simply allude to RCNLD in passing but actually presented a full-blown RCNLD appraisal to the trial court. The appraisal also was in the record before the Appellate Division. (R. 1012). Petitioner's RCNLD appraisal exhibit and testimony remain unreviewed and unchallenged by any of the courts (trial court, Appellate Division, and Court of Appeals).

Petitioner's expert witness, Mr. Breitling, in fifteen pages of direct testimony (R. 451-65), described his RCNLD reasoning and calculations. Perhaps the most graphic demonstration of Mr. Breitling's comprehensive estimate of RCNLD is found in his cross-examination. There, the record shows a total of more than one hundred-fifty (150) pages, including the first seventy pages, of cross-examination (out of some two hundred-forty pages) which reflect opposing counsels' efforts to challenge and test this witness' RCNLD estimate. The Petitioner's expert's evidence of RCNLD did not slip into the record unnoticed. It was subjected to the most intensive cross-examination by opposing counsel. RCNLD was also covered on both redirect examination and recross. (R. 714-18).

Within Exhibit 17, the appraisal by Petitioner's expert, is an extensive Table (I) called "The Brooklyn Union Gas Company Determination of Reproduction Cost New Less Depreciation of Special Franchise Property as of December 31, 1979" and listing twelve steps showing in separate columns the reproduction cost data for gas mains, gas services and measuring and regulating equipment. The appraisal Exhibit continues with twelve more pages which explain in detail the various calculations which resulted in this expert's estimate of RCNLD. The appraisal also contains six appendices listing additional detail and calculation by which the witness arrived at his final reproduction cost estimate.

Petitioner thus had before the Court an appraisal—a comprehensive RCNLD analysis—the methodology that the Court of Appeals has espoused. Mr. Breitling's calculations on that basis are spread on the record in his appraisal report, in his direct examination, in his cross-examination by the attorneys for both respondents and in his redirect testimony. The trial court, having rejected the sole opposing appraisal witness as unqualified and the Appellate Division having followed suit, the only credible RCNLD evidence in the record was Brooklyn Union's and its petition should not have been dismissed. The arbitrary dismissal on motion for reargument precluded any possibility of a factual judicial determination according to the method the Court of Appeals promulgated as proper. The arbitrary dismissal of the petition is a violation of the due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.

II. The Court of Appeals' Dismissal is in Direct Contrast to that Court's Previous Treatment of Other Petitioners Where Record Evidence on the Proper Theory was Submitted.

That the Court of Appeals' harsh summary dismissal of the petition was unconstitutional is highlighted by the fact that the Court's action was a departure from its own customary treatment of petitioners in tax review cases where the Court on appeal determined that a different method of valuation should have been utilized at trial.

For example, petitioner in *Metropolitan Life Insurance Co. v. Tax Commission*, 53 N.Y.2d 1050, 442 N.Y.S.2d 489 (1981), like Brooklyn Union, sought judicial review to obtain a reduction in a tax assessment. The parties disagreed on the proper basis for determining the factual question of value. While both agreed on a capitalization of income approach, the petitioner sponsored use of a multiple-tenant standard to arrive at net income, while the

Tax Commission argued that the single-tenant standard must be used. The trial court adopted the petitioner's approach and reduced the assessment. The Appellate Division preferred the Tax Commission's method, and reinstated the assessment. When the Court of Appeals reversed the Appellate Division order because the approach used by the trial court was found to be valid, it remitted to the Appellate Division for further proceedings because that court could determine the factual valuation issue on a record that was already complete. Here, the record, which is replete with evidence of RCNLD, is also complete. Therefore, to preserve Brooklyn Union's due process rights to a ruling on the merits of its property assessment, the matter should have been remitted to the Appellate Division to make the factual determination of value on the already complete trial record.

In proceedings for tax review, the lower appellate courts consistently have applied the Court of Appeals' approach and afforded the parties every opportunity to have "their day in court." Thus, in *Pepsi-Cola Co. v. Tax Commission*, 19 A.D.2d 56, 240 N.Y.S.2d 770 (1st Dept. 1963), the court, after observing that ordinarily it would reinstate the original assessment which had been reduced below, went on to say:

> Upon due consideration of all relevant factors, so far as developed by the evidence in the record here, it appears that the reduction of the assessment for the year 1960-61 as directed by the trial court, is not supported. This would ordinarily call for a reinstatement of the assessment by this court. But, because the parties were in some misapprehension as to the proper methods to be followed by their experts in the making of their appraisals, they have failed to properly and fully develop all factors which are relevant to the question of the value of this property for assessment purposes for the year 1960-61. Consequently, in the interests of justice, the order of Special Term should be modified to remand for a new

> trial with respect to the issues appertaining to the assessment for the said tax year, and the order should be otherwise affirmed, without costs.

19 A.D.2d at 61-62, 240 N.Y.S.2d at 777.

In *Mobil Oil Corp. v. Tax Commission*, 60 A.D.2d 910, 401 N.Y.S.2d 565 (2d Dept. 1978), there was no expert testimony at all and petitioner's only proof consisted of the sale of the property on August 1, 1970, and an income and expense statement for the year in issue. However, despite the paucity of petitioner's evidence, the court, on the law and in the interests of justice, reversed dismissal of the petition and remanded for a rehearing, citing the *Pepsi-Cola* decision. In the present case, Petitioner has submitted extensive testimony on RCNLD and an RCNLD appraisal while the respondents, in the judgment of the trial court, the finder of fact, failed to submit any credible evidence at all. The facts in the record here required either an affirmance by the Court of Appeals or at least a remand for determination of value based upon Petitioner's RCNLD evidence.

Still another case where, due to misapprehension below as to the proper legal approach, the appellate court remanded for a new trial is *BCA-White Plains Lanes, Inc. v. Glaser*, 91 A.D.2d 633, 457 N.Y.S.2d 299 (2d Dept. 1982), *appeal dismissed*, 59 N.Y.2d 673 (1983), where the court said:

> Thus, both sides were under a misapprehension and erred in their valuation approaches. We further find that respondents' Elmsford Bowling Lanes sale comparable is insufficient and inadequate to alone sustain the assessments. Under all of the circumstances, justice requires that there be a new trial (see *Matter of Pepsi Cola Co. v. Tax Comm. of City of N.Y.*, 19 AD2d 56).

91 A.D.2d at 635, 457 N.Y.S.2d at 302.

Of significance on this point is *Property Portfolio 182 Corp. v. Tax Commission*, 58 A.D.2d 650, 396 N.Y.S.2d 72 (2d Dept. 1977), where the court said:

> In our opinion, petitioner has succeeded in overcoming the presumed validity of the assessments but, due to its misapprehension as to the proper method to be followed by its expert in the making of his appraisal, has failed to develop all of the factors relevant to the question of the value of this property in the tax years being reviewed. Consequently, the proceeding should be remanded for a new hearing where these issues may be fully explored (*See Matter of Pepsi-Cola Co. v. Tax Comm. of City of N.Y.*, 19 AD2d 56).

58 A.D.2d at 651, 396 N.Y.S.2d at 73-74.

The court there concluded:

> Notwithstanding petitioner's proof that the property was overassessed, we do not believe that its method of appraisal was proper in this case. While that method may be used in certain condemnation cases (see *Matter of Port Auth. Trans. Hudson Corp. [Hudson Tubes Purposes]*, 48 Misc 2d 485, mod 27 A.D.2d 32, mod 20 NY2d 457; cf. *Matter of City of New York [644 Baltic St. Realty Corp.]*, 44 AD2d 599), its usefulness and accuracy in finding a value at a past tax status date is questionable. A new hearing will enable the court to arrive at a correct valuation.

58 A.D.2d at 652, 396 N.Y.S.2d at 74.

In the present proceeding, even if the courts below arrived at the result by using an erroneous theory, their conclusions of gross overvaluation and incorrect assessments are still supported by Petitioner's substantial and uncontroverted evidence of RCNLD—the Court of Appeals' preferred method. Accordingly, the petition should not have been dismissed. Departing from what has long been customary practice in the courts of New York State, the

Court of Appeals has denied to the Petitioner its day in court in violation of elementary considerations of due process.

III. This Case Presents Important Federal Questions Relating to Public Utility Property Valuation and Involving the Enormous Detrimental Impact the Court of Appeals' Decision Will Have Upon Consumers of Energy as well as Litigants in Other State Cases.

(1)

Mr. Justice Thurgood Marshall has sounded a warning concerning "state action" which applies here with striking force. He said: "Very often state action—either legislative, executive or judicial—is dictated by the consideration that the end justifies the means." T. Marshall, *Remarks at Harvard University Law School Conference on "Government Under Law: Judicial Method in Due Process Inquiry"* (September 22, 1955) (reprinted in Harvard Law School Bulletin 347, 348 (1956)).

The *amici curiae* in the Court of Appeals, representing certain municipal entities, pressed on the Court, without any support in the record, the assertion they would have to make large refunds if the lower courts' decisions in favor of the Petitioner were affirmed. The corporation counsel of the City of New York on the argument before the Court of Appeals alleged that an affirmance would be "catastrophic." They persuaded the Court of Appeals to accept a method of valuation which purportedly got them off the hook on which the outrageous overassessments by the SBEA had impaled them.

Imposing heavy taxes by excessive valuations of the property of the local public utility, which the utility must collect from its customers in the form of higher utility rates, enables the taxing authorities to escape culpability

and responsibility for their heavy exactions by camouflaging them as utility rates. Neither the higher utility rates directly attributable to these taxes nor any refund from such exactions accrue to the benefit of Brooklyn Union or its stockholders. The New York Public Service Commission has made it clear that any refunds obtained by Brooklyn Union because of illegal and excessive taxation would be returned to the natural gas consumers from whom they were collected.[6] In fact, the higher rates which the utility must collect are a distinct detriment to it since such rates impair its competitive position vis-a-vis other strong competitors who supply alternative fuels, such as oil.

Dean Griswold has written that due process is "an idea born out of the hearts of men. . . . Perhaps the essential thought can be put by saying that due process has some application wherever men feel a sense of injustice." E. Griswold, THE FIFTH AMENDMENT TODAY 37 (1955).

We do feel a sense of injustice. We are in the business of supplying gas to a community which includes some of the poorest and most deprived persons in the nation.[7] Yet substantially by reason of unconscionably high tax assess-

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[6] The Public Service Commission filed an *amicus* brief in the Court of Appeals proceeding in support of Brooklyn Union and its gas consumers. In that brief the Commission stated that "it is conceivable that the Commission would require the entire refund to be passed through to the company's ratepayers. Finally Brooklyn Union's ratepayers would continue to benefit from a ruling requiring tax refunds because the company's reduced property tax expense would result in lower future utility bills." (N.Y. P.S.C. *Amicus* Brief dated January 7, 1985 at p. 7).

[7] The Public Service Commission noted in its *amicus* brief that "Brooklyn Union has the third highest gas rates of any gas utility in the United States." (N.Y. P.S.C. *Amicus* Brief at p.6, n.2). Approximately 38% of its customers are on fixed income, elderly or below the poverty line. These excessive assessments impact disproportionately upon the poor and elderly who, by necessity, must spend a larger percentage of their income on the cost of energy than other segments of the population served by Brooklyn Union.

ments Brooklyn Union's rates are among the highest in the nation. Believing that the laws of the State of New York afforded us a remedy, we went to court protesting the tax assessments. The constitution of the State of New York decrees that tax assessments on property may not exceed "full value." We proved on the trial that the tax assessments against our special franchise properties were far in excess of "full value." We did this by using different recognized criteria of value including RCNLD which, our Court of Appeals now says, is the proper method of valuing this property. The respondent SBEA offered no witnesses or reply and relied on a witness of the intervenor whose testimony was given no weight. The trial court, having heard the witnesses, agreed with us and adjudged that the assessments should be reduced by more than $106 million. The trial court's findings were unanimously approved by the highest fact-finding tribunal in the State—the Appellate Division. The Court of Appeals, whose constitutional jurisdiction does not extend to matters of fact, completely disregarded the record in our case and summarily dismissed our petition though our evidence fulfilled the very criterion which the Court held was proper and acceptable.

(2)

The Court's summary foreclosing of all further adjudication in this case is contrary to established practice of the courts in the State of New York that has allowed a litigant in a valuation case to, in effect, plead over when he has submitted an appraisal on a basis that the Court deems inappropriate. In this case, the Petitioner did not need to plead over—it had already submitted an appraisal on the very same basis that the Court held to be appropriate. When the Court, in spite of this, summarily dismissed the petition, it deprived the Petitioner of its day in court in violation of the due process clause of the U.S. Constitution.

(3)

As advocates presenting causes of action to the courts of the State of New York, we are especially concerned about

the procedure followed by the Court of Appeals in this case. The significance of the Court's holding for us as lawyers is that it puts on us, on penalty of dismissal of our client's case, the burden of guessing in advance which of several possible answers the Court will give to the legal problem presented by the case. The dilemma posed for the lawyer by varying possible solutions is recognized in the Civil Practice Law of New York State which allows the litigant to present alternative and even inconsistent answers to legal problems. In refusing to recognize the possibility of the existence of different answers to a legal problem, the action of the Court of Appeals compels the lawyer to stake his client's case on his judgment as to which of several answers the court will ultimately give. To place the advocate or the practicing lawyer in such a predicament is to convert a lawsuit into an aleatory situation, no more predictable than a game of chance. To shut the door to all legal theories which a legal case may present makes of a lawsuit no more than a ticket in a lottery, not a rational, reasoned pursuit of the ends of justice. Here, both of the fact-finding tribunals of the state viewed this case favorably to Petitioner on one of two possible methods of valuing the Petitioner's property and they chose what they considered the more appropriate valuation method. The Court of Appeals disagreed and chose the other alternative. Instead of recognizing that Petitioner had also presented a detailed case on this alternative method, instructing the lower fact-finding tribunals and remanding the case for further adjudication on what it considered the preferable method of valuation, the Court of Appeals summarily dismissed the petition and shut off all further consideration of what it had chosen as the preferred alternative.

Though this action of the Court of Appeals is cloaked as a mere technical choice between two opposing standards of value, the Court's judgment, ignoring a competent alternative presentation, affects all practitioners and, here alone, a vast investment that touches the lives of some

four million consumers who rely on Brooklyn Union to supply, at rates they can afford, the energy they daily consume in running their homes and businesses.

Summary and Conclusion

The question of valuation of public utility property is a matter of great importance in both Federal and state courts. This Court has amply instructed, in a long line of cases stretching from *Smyth v. Ames,* 171 U.S. 361 (1898), at least to *FPC v. Hope Natural Gas Co.,* 320 U.S. 591 (1944), that there is much more to the valuation of public utility property than the simplistic, irrebuttable presumption that the Court of Appeals has found in RCNLD. In promulgating that criterion as a conclusive presumption and exclusive criterion of value and arbitrarily dismissing the petition, the Court of Appeals refused to allow consideration of the Petitioner's entire RCNLD case which had already been extensively canvassed at all stages of the trial—on direct examination, on cross-examination, on redirect, and expounded in great detail in the appellate briefs before the Appellate Division and the Court of Appeals and on the motion for reargument in the Court of Appeals.

In ignoring the detailed alternative case presented by the Petitioner (particularly where that case met all of our highest Court's tests), Petitioner's Constitutional rights to a fair hearing were denied. To allow the highest court to blind itself to alternative theories which are presented properly under the authorized evidentiary rules makes it impossible for any petitioner, public utility or not, to avail itself of the remedial procedures prescribed by state statute. The decision of the Court of Appeals in this case raises questions of Constitutional dimensions that deserve the attention of this Court.

In short, the New York State law provides us with the remedy of judicial review of property tax assessments. The decision of the Court of Appeals in this case arbitrarily

dismissing the petition makes of this remedy a snare and delusion. The Court of Appeals purports to render a reasoned determination, but by its arbitrary dismissal of the petition it deprives the Petitioner of the opportunity to follow the Court's rule to its logical conclusion and obtain a determination on the merits.

For these reasons, a Writ of Certiorari should issue to review the decision of the New York Court of Appeals.

Respectfully submitted,

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No. 85-

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE BROOKLYN UNION GAS COMPANY,

Petitioner,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Respondent,

and

THE CITY OF NEW YORK,

Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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January 6, 1986

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Appendix A

Opinion of the Court of Appeals of the State of New York, July 9, 1985

In the Matter of BROOKLYN UNION GAS COMPANY, Respondent, v STATE BOARD OF EQUALIZATION AND ASSESSMENT, Appellant, and CITY OF NEW YORK, Intervenor-Appellant.

In the Matter of NATIONAL FUEL GAS DISTRIBUTION CORPORATION et al., Respondents, v STATE BOARD OF EQUALIZATION AND ASSESSMENT, Appellant, and NIAGARA-WHEATFIELD CENTRAL SCHOOL DISTRICT, Intervenor. (And Nine Other Proceedings.)

Opinion of the Court

ALEXANDER, J.

The issue presented on these appeals is whether the special franchise properties of the Brooklyn Union Gas Company, and those of National Fuel Gas Distribution Corporation and National Fuel Gas Supply Corporation, are specialty property, to be valued for special franchise assessment and taxation purposes by the reproduction-cost-new-less-depreciation (RCNLD) method, or whether a capitalization-of-income method of valuation is an acceptable method of valuation of such property. The Appellate Division, in both cases, has held that the petitioners' special franchise properties are not "specialty properties" and therefore that the capitalization-of-income method is an acceptable method of assessing the value of special franchise property in New York State. We disagree and therefore reverse the Appellate Division orders appealed from.

I

Brooklyn Union Gas Company (Brooklyn Union) is a distributor of natural gas, servicing customers in Kings

County, Queens County and half of Richmond County. It operates its gas distribution business through a system of underground mains, services and related measuring and regulatory equipment that is placed in public streets and thoroughfares. This property, by statutory definition, constitutes a "special franchise".[1]

Brooklyn Union's distribution system of mains is primarily located under public streets, and is composed of 63% cast iron mains with joints that operate at 15 pounds of pressure and require frequent repair. No new cast iron pipes have been installed since the mid-1950's, and none can now be installed because of the prohibitions of Public Service Commission rules. The mains are also composed of steel (34.25%) and plastic (.75%) and 2% of the system of mains belongs to New York Facilities, a joint operation of Brooklyn Union, Consolidated Edison and Long Island Lighting Company. Special Term found that the system would not be reproduced today in its present form.

Distribution's pipelines in New York are composed 9% plastic, 25% coated steel, 63% bare steel and 4% cast iron. Special Term found that Distribution's system would not be exactly reproduced in its present form, but would be reasonably expected to be replaced.

Special franchise property is defined as real property by Real Property Tax Law (RPTL) § 102 (12). It is subject to

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1. Real Property Tax Law § 102 (17) provides: "'Special franchise' means the franchise, right, authority or permission to construct, maintain or operate in, under, above, upon or through any public street, highway, water or other public place mains, pipes, tanks, conduits, wires or transformers, with their appurtenances, for conducting water, steam, light, power, electricity, gas or other substance. For purposes of assessment and taxation a special franchise shall include the value of the tangible property situated in, under, above, upon or through any public street, highway, water or other public place in connection therewith."

annual assessment by the State Board of Equalization and Assessment (RPTL 600) and all taxes and special ad valorem levies for county, city, town, village, school or special district purposes are imposed on the final assessment of each special franchise (RPTL 622). Both the tangible real property and the intangible right to use the streets and thoroughfares (the intangible franchise) are components of a special franchise, and the values of each must be added to determine the value of the entire special franchise.

In April 1980, the State Board of Equalization and Assessment (SBEA) made tentative equalized valuations for the 1980-1981 tax year of the special franchise properties belonging to Brooklyn Union, Distribution and Supply. Each challenged the tentative assessment, contending that it was erroneous by reason of overvaluation, inequality and illegality. Distribution and Supply's challenge was rejected and they instituted proceedings against SBEA pursuant to RPTL article 7 contesting these final valuations.

Brooklyn Union's challenge to its valuation was also rejected by SBEA and instead of being reduced its final equalized valuation was increased because of a revised city-wide equalization rate. Brooklyn Union also instituted an article 7 proceeding against SBEA charging overvaluation, illegality and inequality.

At the trial of the Brooklyn Union proceeding, SBEA did not file an appraisal report or offer any testimony through its personnel as to the valuation method employed. Rather, it relied on the appraisal report and testimony of an expert employed by the City of New York (the city had been granted leave to intervene). The trial court rejected his testimony, finding that he lacked sufficient background and experience to qualify as an expert appraiser of special franchise property. The court also rejected his appraisal

report because it failed to comply with the rules of the Appellate Division as to form and content. The court concluded that the record was barren of any evidence of the appraisal method employed by SBEA in arriving at its valuations. The court noted that the city's expert used the RCNLD method, but that the value he arrived at was more than $100,000,000 higher than that arrived at by SBEA. The court concluded that he did not perform the assessments for SBEA.

The court accepted the expert opinions of the petitioner's witnesses and their valuation of the special franchise property, which appraisals and valuations were arrived at through capitalization-of-income and original-cost-less-depreciation (rate base) appraisal methods. The court accepted the capitalization-of-income method of valuation as "a legitimate method for valuing a special franchise *** especially when the only evidence in the record is that the system, if reproduced, would not be reproduced in its present form." The court determined the final equalized values of Brooklyn Union's special franchise property, located in Kings, Queens and Richmond Counties, for the tax year 1980-1981, to be $83,336,183, $45,511,625 and $25,990,355 respectively. These valuations were significantly lower than in the final assessments of SBEA.

The Appellate Division affirmed, concluding that the "capitalization of income method used [by petitioner's experts] herein provides the most accurate method of determining value", and that rejection of the RCNLD method of appraisal was proper since "the system would never be reproduced in its present form but would be replaced with a new completely modern system". The court found that, in the parlance of an expert real estate appraiser, "[r]eproduction means replacement with an exact model" which "[i]n this case *** is totally unrealistic". Thus, the court held that Brooklyn Union's franchise property "could not be considered a specialty since it is

unreasonable to conclude that the facility could be replaced on an economic basis." The court noted, moreover, that it would "reach the same result even if the facility were considered a specialty" (101 AD2d 414, 416-417).

National Fuel Gas Distribution Corporation (Distribution) and National Fuel Gas Supply Corporation (Supply) are subsidiaries of National Fuel Gas Company. Distribution is a multi-state retailer of natural gas serving customers in New York, Pennsylvania and Ohio. Supply accumulates and sells natural gas at the wholesale level, serving essentially the same geographic area as Distribution. The area served by Distribution and Supply in New York State comprises 12 counties in western New York. They operate this portion of their systems through pipes, mains, conduits and other tangible personal property located in public streets and thoroughfares. This property too is a "special franchise."

Distribution and Supply commenced 10 separate proceedings challenging the SBEA assessments alleging overvaluation, inequality and illegality. The proceedings were consolidated for trial and Niagara-Wheatfield Central School District was permitted to intervene. SBEA appraisal reports, received in evidence, showed that Distribution and Supply's special franchises for 1980 were assessed by computing the reconstruction cost new of all their tangible special franchise property in New York and deducting appropriate figures for depreciation from all causes. SBEA added 5% of the value of the tangible property as the value of the intangible franchises. The total full value assessments for Distribution and Supply were then allocated to the individual taxing jurisdictions by applying a ratio of surviving original cost in each jurisdiction to total surviving original cost for each company. Appropriate equalization rates were applied. These computations produced final total equalized special franchise assessments of $65,071,328 for Distribution and $813,694 for Supply.

Appendix A

Petitioners' experts arrived at full market values of the special franchise properties of Distribution and Supply by using capitalization-of-income under the "unit" method of accounting, with petitioners' operating multistate systems as the "unit". They allocated a proportionate value to those portions of the "unit" located within New York State. They also used the original-cost-less-depreciation method, apparently taking as original cost figures and depreciation rates those used in determining petitioners' "rate bases" by the Public Service Commission and the Federal Energy Regulatory Commission.

Trial Term rejected the valuations of petitioners' experts, finding that capitalization-of-income was an inappropriate method for determining the value of a special franchise such as that under consideration here because, *inter alia* "[t]he basic premise of the income method is that property is worth a certain capitalization of the income it produces. While this system is a complex system with each part necessarily relying upon other parts, the uniform allocation of earning power based upon original cost is risky, at best. Some parts of the system may very well throw off earnings at a greater percentage of cost than a corresponding and physically equal part."

Trial Term concluded, as a matter of law, that "[t]he subject special franchise property is specialty property within the definition set forth in [*Matter of County of*] *Suffolk* (*Van Bourgondien*) [47 NY2d 507]", and that "[p]etitioners failed to demonstrate that the method by which [SBEA] arrived at the 1980 assessments was incorrect." Accordingly, the petitions were dismissed.

The Appellate Division reversed, granted the petitions to the extent of annulling the final 1980 assessments and remitted the matter to SBEA for "reconsideration in light of the fact that the capitalization of income method is an acceptable method for assessing the value of the property

at issue" (103 AD2d 187, 189). Citing *Brooklyn Union*, where it had held that property similar to that which is the subject of these appeals is not specialty property and that the capitalization-of-income method would therefore be permissible as a means of valuation, the court concluded that this record "demonstrates no reason to treat the property involved here differently *** for the purpose of determining that it is not specialty property" (*id.*).

II

The courts of this State have uniformly held that the appropriate method of valuing the tangible component of special franchise property is by the reproduction-cost-new-less-depreciation method (*People ex rel. Delaware, Lackawanna & W.R.R. Co. v Clapp*, 152 NY 490; *People ex rel. Jamaica Water Supply Co. v State Bd. of Tax Commrs.*, 196 NY 39; *Matter of Onondaga County Water Dist. v Board of Assessors*, 39 NY2d 601; *Matter of Consolidated Edison Co. v State Bd. of Equalization & Assessment*, 101 Misc 2d 910, *mod on other grounds* 83 AD2d 355, *affd* 58 NY2d 710). This is because such property is considered to be "specialty property" property designed for "unique" purposes or is "uniquely adapted" to the business conducted upon it or use made of it, for which there is no market, and which cannot be converted to other uses without the expenditure of substantial sums of money (*Consolidated Edison*, 101 Misc 2d, at pp 913-914, *supra*).

In *Matter of County of Suffolk (C.J. Van Bourgondien, Inc.)* (47 NY2d 507, 512), we reaffirmed that a property is a "specialty" when it meets the four criteria enunciated by the Appellate Division in *Matter of County of Nassau (Colony Beach Club)* (43 AD2d 45, *affd* 39 NY2d 958): "(a) [t]he improvement must be *unique* and must be specially built for the specific purpose for which it is designed; (b) [t]here must be a *special use* for which the improvement is

designed and the improvement must be so specially used; (c) [t]here must be *no market* for the type of property *** and no sales of property for such use; and (d) [t]he improvement must be an appropriate improvement at the time of the taking and its use must be *economically feasible and reasonably expected to be replaced"* (43 AD2d, at p 49 [emphasis in original]).

There can be no doubt that the special franchise properties of Brooklyn Union, Distribution and Supply fully satisfy the first three criteria for "specialty property" set forth above.

The evidence in both cases establishes conclusively that the underground mains, pipes, services and related measuring and regulatory equipment that comprise the tangible special franchise property placed in the public streets and thoroughfares for the transmission of natural gas are "unique" and "specially built for the specific purpose for which [they were] designed". This equipment was designed for the "special use" of distribution of natural gas and is being "specially used" for that purpose. It is "*uniquely* adapted to the business conducted upon it or use made of it *and* cannot be converted to other uses without the expenditure of substantial sums of money" (*Matter of Great Atl. & Pac. Tea Co. v Kiernan*, 42 NY2d 236, 240). Clearly, there is no market for this specially designed property, nor is there any evidence that there have been any sales of similar such property for such use.

Nonetheless, the trial court in *Brooklyn Union* found that the system "would not be reproduced in its present form". The Appellate Division agreed and held that because it is "unreasonable to conclude that the facility could be replaced on an economic basis", the property "c[an] not be considered a specialty." This view misperceives the meaning of the requirement that in order for a property to qualify as "specialty" property "the improve-

ment must be an appropriate improvement—and its use must be economically feasible and reasonably expected to be replaced". This requirement relates to the *use* or *function* of the property and means that *use* or *function* must [be] reasonably expected to be replaced. As we pointed out in *Matter of County of Suffolk (C.J. Van Bourgondien, Inc.)* (*supra*), "[t]he last requirement is that at the time of the taking the improvement be appropriate both physically and economically *** Economic appropriateness means simply that the *use* must be economically feasible and reasonably expected to be replaced" (*id.*, at p 513 [emphasis added]). It is manifest that the use or function to which the tangible special franchise property of these utilities is put would be replaced or reproduced. Indeed, in *Brooklyn Union,* the Appellate Division found that "the system *** would be replaced with a new completely modern system" (101 AD2d, at p 416). However, it is not necessary in order for a property to qualify as a "specialty" that the material of which it is originally composed be available or replicated. Significantly, while both courts in *Brooklyn Union* found that the system would not reasonably be expected to be replaced, the trial court in *Distribution* and *Supply* concluded just the opposite. Yet without discussion or explanation, the Appellate Division in the latter case apparently deemed its decision in *Brooklyn Union* to be controlling, and thus rejected the RCNLD valuation. Nonetheless, the Appellate Division observed in *Matter of Tenneco, Inc.-Tennessee Gas Pipeline Div. v Town of Cazenovia,* 104 AD2d 511), decided the same day as *Distribution* and *Supply* and likewise involving the assessment of natural gas transmission lines, that the trial court in that case properly found the pipeline property to be a specialty. The *Tenneco* court stated that: "The subject property meets the requirements for such treatment set forth by the Court of Appeals in *Matter of County of Suffolk (C.J. Van Bourgondien, Inc.)* (47 NY2d 507, 512).

The pipeline is unique and specially built for the purpose of transporting natural gas and is used for that purpose. There is no market for the type of property and there are no sales of property for such use. It could not be converted without substantial expenditures and it is an appropriate improvement, which if destroyed, would be reasonably expected to be replaced or reproduced (cf. *Matter of Brooklyn Union Gas Co. v State Bd.*, 101 AD2d 414)." (104 AD2d 511, 512, *supra.*)[2] The *Tenneco* court further observed that, "[p]etitioner's reliance upon cases applying the net earnings rule to value special franchises for the proposition that income capitalization based on earnings is an appropriate method is misplaced. The leading case of *People ex rel. Jamaica Water Supply Co. v State Bd.* (196 NY 39) illustrates that the net earnings method, which capitalizes the net earnings of the taxpayer, is used to value the intangible franchise for special franchise tax purposes. There the value of the tangible real property was determined on a cost basis" (*id.*, at pp 512-513).

So too, in these cases, the value of the tangible property properly should be determined on a cost basis. Although there is a difference between valuing property by means of the reproduction cost as opposed to using the replacement cost, this fact does not deny to special franchise property the status of "specialty" property, to be valued as such where replacement cost is used rather than reproduction cost, nor does it warrant utilizing the capitalization-of-

2. The court noted in *Tenneco*, without elucidation as to the relevant distinction, that the "instant proceeding involves a real property tax assessment as opposed to a special franchise tax assessment." That to attain the full value of a special franchise, the intangible component must be valued and added to the value of the tangible property does not preclude the tangible property component being considered a "specialty" to be valuated by RCNLD, especially since a special franchise, is by definition, considered to be "real property" (RPTL 102 [17]).

income method of valuation with respect to petitioners' tangible property.

We hold, therefore, that the special franchise properties of Brooklyn Union, Distribution and Supply are "specialty properties" and that the proper method of valuing their tangible property is by RCNLD, to which should be added, in order to determine the full value, the value of the intangible franchise (the right to use the public streets and thoroughfares for the placement of their tangible property), arrived at by capitalization-of-income, where there exists excess income, or by adding 5% of the value of the tangible real property where there is no excess income.

Accordingly, the order of the Appellate Division in *Matter of National Fuel Gas Distrib. Corp.* should be reversed and the judgments of the Supreme Court dismissing the petitions reinstated. The order of the Appellate Division in *Brooklyn Union Gas Co.* should be reversed, the petition dismissed and SBEA's determination reinstated.

Chief Judge WACHTLER and Judges JASEN, MEYER, SIMONS, KAYE and TITONE concur.

In *Matter of Brooklyn Union Gas Co. v State Bd.:* Order reversed, with costs, petition dismissed, and the determination of the State Board of Equalization and Assessment reinstated.

In *Matter of National Fuel Gas Distrib. Corp. v State Bd.:* Order reversed, with costs, and the judgments of Supreme Court, Albany County, reinstated.

Appendix B

Opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, May 24, 1984

In the Matter of BROOKLYN UNION GAS COMPANY, Respondent, v STATE BOARD OF EQUALIZATION AND ASSESSMENT, Appellant, and CITY OF NEW YORK, Intervenor-Appellant.

APPEARANCES OF COUNSEL

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Cullen & Dykman (*F. Peter O'Hara, Lewis Orgel* and *Herman Meltzer* of counsel), for respondent.

OPINION OF THE COURT

KANE, J.

Petitioner is a distributor of natural gas servicing Kings County, Richmond County and one half of Queens County. In April, 1980, the State Board of Equalization and Assessment (SBEA) made a tentative equalized valuation of petitioner's special franchises for the tax year 1980-81. Dissatisfied with the equalization rates employed and the assessments made, petitioner filed for a reduction in the valuation and assessment of its special franchises. This complaint, however, resulted in an increase in the final equalized valuation, reflecting a revised city-wide equalization rate, rather than the sought after reduction. Petitioner then instituted this proceeding against the SBEA pursuant to article 7 of the Real Property Tax Law challenging its final equalized valuation of $138,533,622 for Kings County, $76,771,033 for Queens County and $46,284,099 for Richmond County on the ground of overvaluation, inequality

and illegality. The two latter grounds were subsequently abandoned, and at trial petitioner limited its proof to overvaluation. The City of New York was granted permission to intervene in this proceeding.

Conflicting expert testimony was presented at trial by petitioner and the City of New York, with the SBEA adopting the testimony of the city's expert and not presenting any independent expert of its own. The witnesses disagreed, both as to value and the method of determining value. At the conclusion of the trial, the court, in a written decision, adopted the theory of petitioner's experts, rejected the testimony of the city's expert, and found that petitioner had overcome the presumption of validity of the SBEA's assessments. In accordance with its findings, the judgment of the court reduced the special franchise assessments to $83,336,183 for Kings County, $45,511,625 for Queens County and $25,990,355 for Richmond County.

The key issue to be resolved on this appeal is whether the court was correct in accepting petitioner's evidence of valuation and, particularly, the capitalization of income approach used by its appraisers in determining value.

[1] It is the rule that courts should not establish an exclusive rule for franchise valuation which would apply in all cases. However, if in a particular case there is only one reasonable method of determining the true value of the special franchise, it is the duty of the assessing authority to use that method (*People ex rel. Jamaica Water Supply Co. v State Bd. of Tax Comrs.*, 196 NY 39, 51). Applying that rule to the matter at hand, we conclude that the trial court was correct. Petitioner's physical facilities are a combination of old and new. Some 63% of its transmission lines are large cast iron mains with joints every 10 feet, operating at low pressure and requiring frequent repairs, while others are high pressure lines of steel which also require replacement with modern noncorrosive materials.

Appendix B

Changes in demand for gas, both residential and commercial, require continuous modifications and improvements necessitating over 26,000 permits from the city in the year 1979 alone. Under these circumstances, both of petitioner's appraisers, recognized experts in the field of public utilities and eminently qualified, rejected the reproduction cost less depreciation method for determining value. The record demonstrates the validity of that reasoning for the simple reason that the system would never be reproduced in its present form but would be replaced with a new completely modern system. Reproduction means replacement with an exact model, in the parlance of an expert real estate appraiser. In this case, such a procedure is totally unrealistic.

Because of the unusual nature of a special franchise, a difficult appraisal problem is presented. We are of the view that the method selected by petitioner's appraisers was proper. It was, essentially, the capitalization of income method of approach, arrived at by calculating the income attributable to the special franchise by determining the ratio of rate base value of the special franchise to the total rate base value of the entire facility, and applying that ratio to petitioner's operating income. The over-all rate of return applied to income was obtained by traditional methods after examining returns on equity throughout the entire gas industry. Since the market data approach could not be considered because of the lack of comparable sales, and the facility could not be considered a specialty since it is unreasonable to conclude that the facility could be replaced on an economic basis (*Matter of County of Suffolk* [*C.J. Van Bourgondien, Inc.*], 47 NY2d 507, 511; *Colonie Hill v Boncore,* 87 AD2d 581, mot for lv to app den 57 NY2d 608), the capitalization of income method used herein provides the most accurate method of determining value (*Matter of Food Fair v Board of Assessment Review,* 78 AD2d 335, 337; *Matter of Niagara Mohawk*

Power Corp. v. Public Serv. Comm., 52 AD2d 388, 390, mot to dismiss app granted 40 NY2d 844, mot for lv to app den 40 NY2d 806). Moreover, we would reach the same result even if the facility was considered a specialty.

[2] Additionally, we find no error in the trial court's initial determination that the city's expert witness was qualified as such and thereafter rejecting his entire testimony when his relative lack of adequate qualifications on the issue at hand became manifest (*Felt v Olson*, 74 AD2d 722, affd 51 NY2d 977). Furthermore, the court properly rejected his testimony as entitled to no weight, since it was founded upon an unacceptable method of valuation. Finally, we view the SBEA's argument that they were deprived of the testimony of their own appraiser as a result of the court's ruling without merit. If, as contended, their appraiser had been in the courtroom and available, an application to the court for an opportunity to produce this witness could have been made at any time. The SBEA elected to rely upon the city's appraiser, and they are bound by their own judgment and trial strategy.

[1] In summary, the record demonstrates that the presumption of validity of the SBEA assessment has been overcome and the method of assessment offered by petitioner was correct in both form and application (*Matter of Katz Buffalo Realty v Anderson*, 25 AD2d 809).

The judgment should be affirmed, with costs.

MAIN, YESAWICH, JR., and HARVEY, JJ., concur.

Judgment affirmed, with costs.

Appendix C

Opinion of the Supreme Court, Albany County, May 24, 1983

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of THE BROOKLYN UNION GAS COMPANY,

Petitioner,

-against-

Index No. 6961/80

STATE BOARD OF EQUALIZATION AND ASSESSMENT and THE CITY OF NEW YORK,

Respondents.

(Supreme Court, Albany County Trial Term,
Commencing April 28, 1982)
(Calendar No. N-120)

(JUSTICE HAROLD J. HUGHES, PRESIDING)

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Appendix C

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HUGHES, J.:

Petitioner brings this certiorari proceeding under article 7 of the Real Property Tax Law to review the special franchise assessments levied by the State Board of Equalization and Assessment (SBEA) against petitioner's special franchise property located in the boroughs of Brooklyn, Queens and Staten Island for the tax year beginning July 1, 1980 and ending June 30, 1981. In the petition the Brooklyn Union Gas Company (Brooklyn Union) asserted claims of over-valuation, inequality, illegality, and unconstitutionality of sections 600 and 606 of the Real Property Tax Law. Upon trial, petitioner presented evidence and legal arguments solely as to over-valuation, apparently abandoning its other claims. The petitioner advanced its case through the testimony of its senior vice-president and chief engineer, Frederick W. Sullivan; its vice-president and chief accounting officer, Fred J. Gentile; and two expert appraisers, Julius Breitling and John E. Green. The written appraisals of Breitling and Green were received in evidence. The respondent SBEA did not file an appraisal or offer any witnesses on its own behalf, instead joining in the appraisal and expert testimony offered by co-respondent intervenor City of New York.

The property being valued in this proceeding is a special franchise, which is defined in subdivision 17 of section 102 of the Real Property Tax Law as:

"[t]he franchise, right, authority or permission to construct, maintain, or operate in, under, above, upon or through any public street, highway, water or other public place mains, pipes, tanks, conduits, wires or transformers, with their appurtenances, for conducting water, steam, light, power, electricity, gas or other substance. For purposes of assessment and taxation a special franchise shall include the value of the tangible property situated in, under, above, upon or through any public street, highway, water or other public place in connection therewith. The term special franchise shall not include property of a municipal corporation or special district, nor shall it include a crossing less than two hundred fifty feet in length of a public street, highway, water or other public place outside a city or village, unless such crossing be the continuation of an occupancy of another public street, highway, water or other public place."

Section 606 of the Real Property Tax Law directs the SBEA to determine a special franchise assessment in the following manner:

"1. Notwithstanding the provisions of section three hundred six of this chapter, in determining a special franchise assessment the state board shall apply the latest state equalization rate or special equalization rate established pursuant to subdivision two of this section to the full value of such assessment, except that the state board shall apply the nineteen hundred fifty-three state equalization rate to any portion of the value of the special franchise which was assessed for the year nineteen hundred fifty-three, and; provided, however, that in determining the assessed value of a special franchise in an assessing unit which, subsequent to nineteen hundred fifty-three, has completed a revaluation in compliance with the standard of

section three hundred six of this chapter, the state board shall apply the latest state equalization rate or special equalization rate established pursuant to subdivision two of this section to the full value of all such property, notwithstanding the foregoing exception for property assessed in nineteen hundred fifty-three."

"2.a. The state board may establish a special equalization rate for special franchise assessment purposes when there has been a change in the level of assessment on the assessment roll for which a special franchise assessment is to be determined, upon its own motion or upon application of a special franchise owner or an assessing unit in which the special franchise property is located. As used in this subdivision, the term 'change in the level of assessment' means the net increase or decrease in the assessed valuation of the taxable property in the assessing unit as a result of assessing such property at a higher or lower ratio of full value."

"b. The assessor is hereby authorized and directed to make the changes, if any, occurring as a result of the application of this section on the assessment roll notwithstanding the fact that he may receive the determination of the final assessment of any special franchise after the final completion, verification and filing of such assessment roll. Other local officers, including school authorities, having custody and control of such roll, are also hereby authorized and directed to make any such changes."

Under the statute SBEA is to determine the full market value of the special franchise and apply to that portion that was on the assessment rolls for the year 1953 the equalization rate for 1953, and to that portion added thereafter, the latest State or special equalization rate.

Against that background, and upon the testimony, and exhibits admitted into evidence, the court makes the following findings of fact:

1. The petitioner is a corporation engaged in the distribution of natural gas in the boroughs of Brooklyn, Queens and Staten Island.

2. The SBEA is a State agency charged by statute with the exclusive authority to determine the assessed value of all special franchise properties located in the State.

3. The respondent-intervenor City of New York is a municipal corporation in which the petitioner operates through its special franchises.

4. The petitioner operates its gas distribution business through a system of underground mains, services, and related measuring and regulating equipment.

5. The natural gas distributed by petitioner flows from interstate pipelines into New York Facilities Mains, a joint operation of petitioner, Consolidated Edison and Long Island Lighting Company.

6. The gas is then distributed through Brooklyn Union's high pressure mains and eventually reduced by governors to the lower pressure required for the older mains and service lines.

7. 63% of petitioner's system is composed of cast iron mains with joints which operate at fifteen pounds of pressure.

8. Petitioner has not installed any new cast iron pipes since the mid-1950's, and subsequent rules of the Public Service Commission prohibit the installation of cast iron pipe at the present time.

9. The cast iron mains, being the older portion of the system, are prone to leak at the joints, which requires repair through the use of joint clamps.

10. 34.25% of petitioner's main system is steel, and .75% is plastic, both of which operate at sixty pounds of pressure.

11. 2% of the system is comprised of New York Facilities Mains which can operate at up to 350 pounds of pressure.

12. As of December 31, 1979 petitioner had a total of 19,891,993 feet of mains in service, of which 19,615,125 were located under public streets.

13. In 1980 petitioner dispensed approximately 107 billion cubic feet of gas to approximately one million customers.

14. The operation of petitioner's business requires it to have continuing access to various portions of its mains for repairs, replacement, or relocation, and in order to excavate it needs a permit from the City of New York, of which 26,016 were obtained during 1979.

15. On June 19, 1980 the SBEA issued its certificate of final special franchise assessments against petitioner's special franchises as follows: for the County of Kings a final assessment of $138,533,622; for the County of Queens a final assessment of $76,771,033; and for the County of Richmond a final assessment of $46,284,099.

16. In this proceeding the valuation day has been stipulated as January 25, 1980.

17. The special equalization rate for the City of New York for the tax year in question was 49.36%.

18. The 1953 State equalization rates were as follows: for Kings County 98%; for Queens County 93%; and for Richmond County 96%.

19. Petitioner's special franchise property located in the County of Richmond had a full valuation in the year 1953 of $3,544,300.

Appendix C

20. Petitioner's special franchise property located in the borough of Queens had a full valuation in 1953 of $15,871,700.

21. Petitioner's special franchise property located in the borough of Kings for 1953 had a full valuation of $27,090,800.

22. The full 1953 value of petitioner's special franchise property located in the Counties of Kings, Queens and Richmond is $46,506,800 which, when equalized under the applicable rates, produces an assessed value of $44,712,193.

The court must determine if the SBEA's valuation is correct and, if not, to determine the correct value (*People ex rel. City of New York v Keeler*, 237 NY 332, 334). The value arrived at by the SBEA has a presumption of validity (*People ex rel. Jamaica Water Supply Co. v State Bd. of Tax Comrs.*, 196 NY 39, 53), which presumption disappears once the petitioner establishes a prima facie case to the contrary (*People ex rel. Beardsley v Barber*, 266 AD 371, affd 293 NY 706). Once the petitioner has removed the presumption by introducing substantial evidence sufficient to create a question of fact on the valuation issue, the trial proceeds *de novo* with both sides put to the burden of proving the merit of their positions (*Matter of Katz Buffalo Realty Inc. v Anderson*, 25 AD2d 809). In *Matter of Consolidated Edison Co. of N.Y. v Equalization & Assessment* (83 AD2d 355, 357 affd 58 NY2d 710; see also *Matter of Brooklyn Union Gas Co. v State Bd. of Equalization & Assessment*, 85 AD2d 756, affd 58 NY2d 713), the Third Department instructed that in a special franchise tax review proceeding the function of the court is as follows:

> "The sole duty of the court in this proceeding ultimately will be to determine whether the SBEA assessment method was correct in form and application."

Determination of that issue is almost impossible in this case. Initially, the court notes the rule that no pretrial discovery is permissible to "examine the SBEA's assessors as to the mental processes and formulae they used in arriving at their determination" (*Matter of National Fuel Gas Distr. Co. v State Bd. of Equalization & Assessment,* 86 AD2d 707). Sometimes the SBEA's assessment method can be determined from the appraisal report submitted under 22 NYCRR 839.2 or by trial testimony of the Agency's employees. In this case the SBEA did not file an appraisal, nor did it offer any testimony through its personnel as to its assessment method. Instead, it relied upon the filed appraisal and testimony of the City's expert, Jack C. Emery. Mr. Emery used the reproduction cost new less depreciation method to arrive at a value more than $100,000,000 higher than that arrived at by the SBEA. Certainly Mr. Emery did not perform the original assessments on behalf of the SBEA and there is no indication in the record that the Agency employed the same assessment method or figures. The result is that the court is totally in the dark upon the central issue it is required to decide, i.e., "whether the SBEA assessment method was correct in form and application". This court will not presume to do what the trial court did in *People ex rel. Jamaica Water Supply Co. v. State Bd. of Tax Comrs.* (196 NY 39, *supra,* 53-55) and assume that the SBEA used a certain valuation method. Instead, the court will ascertain the full value of petitioner's special franchises from the proof in the record since the ultimate "concern is with the assessment imposed and not the manner in which the assessment was determined" (*Consolidated Edison Co. of N.Y. v State Bd. of Equalization & Assessment,* 112 Misc 2d 422, 423).

Proof of the value of a special franchise is essentially a matter of expert testimony (see Lee & LeForestier, Review and Reduction of Real Property Assessments in New

York, 2d ed, §§819, 820, pp 341-343). The SBEA, not having filed an appraisal, is subject to the rule set forth in 22 NYCRR 839.2 (subd [d]) which provides:

> "Upon the trial of the proceedings, all parties shall be limited in their affirmative proof of value to matters set forth in their respective appraisal reports. Any party who fails to file an appraisal report as herein required shall be precluded from offering any appraisal testimony on value".

While SBEA was precluded from offering direct proof of value, its evaluation could be sustained if other evidence in the record supported it (*Amsterdam Urban Renewal Agency v Jacobson*, 85 Misc 2d 869). The weight to be accorded an expert's opinion is a matter for the trier of fact (*Coates v Peterson & Sons*, 48 AD2d 890). The background and qualifications of the expert are significant in determining the weight to be accorded to his testimony (*Semple School for Girls v Boyland*, 308 NY 382). On that score, the City's expert testified to the following qualifications: (1) he did not graduate from college; (2) he completed 16 credit hours in the area of appraisal at Pennsylvania State University in order to qualify for a broker's license in that state, and has taken no other formal courses in appraising; (3) he has never taken a course with respect to the appraisal of utilities; (4) none of the courses he has taught or seminars in which he has taken part dealt with the assessment of utility properties or special franchise properties; (5) he is not a licensed engineer or architect; (6) he has never worked as a contractor; (7) he has never worked for a gas utility or been involved in the sale or purchase of utility property; (8) prior to this court appearance he had never appraised a special franchise property of a gas utility; (9) although he is a senior member of the American Society of Appraisers his category of expertise is intangible assets and he is not listed by that society as an appraiser designated in the public utility class. In addition

to the foregoing, the appraisal filed by Mr. Emery failed to comply with the rule of the Appellate Division as to form and content. The court concludes that Mr. Emery's appraisal of the value of petitioner's special franchise is entitled to no weight.

Having rejected respondent's expert testimony, the court must accept the testimony of petitioner's experts as to valuation or supply an adequate rationale supported by the record for reaching a different result (*Matter of Rochester Urban Renewal Agency v. Phillips,* 60 AD2d 752; *Lawyers Co-op Pub. Co. v State of New York,* 47 AD2d 122, affd 39 NY2d 760; *Clearwater v State of New York,* 30 AD2d 883, affd 23 NY2d 1006). The court has considered the testimony and appraisals of petitioner's experts, who arrived at valuation through capitalization of income, and original cost less depreciation (rate base). Capitalization of income is a legitimate appraisal method for valuing a special franchise (*People ex rel. Jamaica Water Supply Co. v State Bd. of Tax Comrs.,* 196 NY 39, *supra*), especially when the only evidence in the record is that the system, if reproduced, would not be reproduced in its present form. The valuation methods employed by petitioner's expert Julius Breitling are correct in form and application, and there is nothing in the record to lead the court to a contrary opinion. In view thereof, the court makes the following determinations:

a) The highest and best use of the property is its present use.

b) The system would not be reproduced in its present form.

c) The full value of petitioner's special franchises is $267,819,000 attributable as follows: $141,596,000 to Kings County; $77,060,000 to Queens County; and $49,163,000 to Richmond County.

d) The portion of the value of the special franchise property located in Richmond County which was assessed for the year 1953 is $3,544,300 which, when applying the equalization rate of 96%, results in an equalized value of $3,402,528.

e) The post-1953 value of the special franchise property located in Richmond County is $45,761,474 which, when applying the equalization rate of 49.36%, produces a figure of $22,587,827.

f) The final assessment for the County of Richmond for the tax year in question is $25,990,355.

g) The full value of the portion of the special franchise in Queens County which was assessed for the year 1953 was $15,871,700 which, when assessed at the equalization rate of 93%, produces an equalized rate of $14,760,681.

h) The present full value of the special franchise property located in Queens County minus that portion assessed for the year 1953 is $62,299,319 which, upon applying the equalization rate of 49.36%, results in a figure of $30,750,934.

i) Combining the two figures renders an equalized value of the special franchise in Queens County for the tax year involved of $45,511,625.

j) The portion of the value of the special franchise which was assessed in Kings County for the year 1953 was $27,090,800, which, when applying the equalization rate of 98%, produced an assessed value of $26,548,984.

k) The portion of the full value of the Kings County special franchise excluding the 1953 portion is $115,047,016, which, by applying the equalization rate of 49.36%, results in a figure of $56,787,199. Combining the two figures results in an equalized value of the special franchise located in Kings County of $83,336,183.

Appendix C

The court will grant judgment to the petitioner, without costs, adjudging the equalized value of petitioner's special franchises for the Counties of Kings, Queens and Richmond, to be in the amounts set forth in this decision. Petitioner is directed to submit a proposed judgment on notice.

Dated: May 24, 1983

Appendix D

Final Judgment of the Court of Appeals of the State of New York, August 1, 1985

STATE OF NEW YORK
SUPREME COURT — ALBANY COUNTY

BROOKLYN UNION GAS COMPANY,
Petitioner-Respondent,
-against-
STATE BOARD OF EQUALIZATION AND ASSESSMENT,
Respondent-Appellant,
and
THE CITY OF NEW YORK,
Intervenor-Appellant.

JUDGMENT
INDEX NO. 6961-80
DOL NO. 84025775

The Respondent-Appellant herein, represented by Robert Abrams, Attorney General of the State of New York, State Capitol Building, Albany, New York, 12224, having been granted permission to appeal to the Court of Appeals from an order of the Appellate Division, Third Department entered June 5, 1984, which affirmed a judgment of the Supreme Court, Albany County at Special Term (Hughes, J.), entered June 16, 1983, which granted petitioner's application, in a proceeding pursuant to Article 7 of the Real Property Tax Law, to, *inter alia,* reduce petitioner's special franchise assessments for the tax year 1980-81, and the Court of Appeals, after due deliberation, having rendered a decision on the 9th day of July, 1985, ordering that the order so appealed from be reversed, with costs, the petition dismissed, and the determination of the State Board of Equalization and Assessment reinstated, the Remittitur from the Court of Appeals having been filed in the office of the Clerk of Albany County, it is hereby

Appendix D

ADJUDGED, that the aforesaid order of the Appellate Division-Third Department be, and the same hereby is reversed, the petition dismissed, and the determination of the State Board of Equalization and Assessment reinstated, with costs of $2354.00 to be taxed against the Petitioner-Respondent, whose address is 176 Remsen Street, Brooklyn, New York, in favor of Respondent-Appellant, and that the Respondent-Appellant have execution thereon.

/s/ Marie A. Reilly

DEPUTY COUNTY CLERK

DATED AND ENTERED:
August 1, 1985

STATE OF NEW YORK
[SEAL] COUNTY OF ALBANY CLERK'S OFFICE ss.:

I, GUY D. PAQUIN, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy *Judgment* with the original thereof filed in this office on the *1* day of *Aug* 19 *85* and that the same is a correct transcript therefrom, and the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal, this *1* day of *Aug* 1985

/s/ Guy A. Paquin Clerk

Appendix E

Decision of the Court of Appeals of the State of New York Denying Petitioner's Motion for Reargument, October 8, 1985

3 Mo. No. 855

In the Matter of the Application
of THE BROOKLYN UNION GAS COMPANY
Respondent,

-against-

STATE BOARD OF EQUALIZATION AND ASSESSMENT,
Appellant,

and CITY OF NEW YORK,
Intervenor-Appellant.

Motion for reargument denied with twenty dollars costs and necessary reproduction disbursements to intervenor-appellant.

DECISION COURT OF APPEALS OCT 8 - 1985

Appendix F

Constitutional and Statutory Provisions Involved

1. The Constitution of the United States provides in pertinent part:

AMENDMENT V:

No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

AMENDMENT XIV:

No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

2. Title 28 of the United States Code provides:

SECTION 1257:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

3. The New York Real Property Tax Law, Section 102(17), defines "special franchise" as:

"Special Franchise" means the franchise, right, authority or permission to construct, maintain or operate in, under, above, upon or through any public street, highway, water or other public place, mains, pipes, tanks, conduits, wires or transformers, with their appurtenances, for conducting water, steam,

light, power, electricity, gas or other substance. For purposes of assessment and taxation a special franchise shall include the value of the tangible property situated in, under, above, upon or through any public street, highway, water or other public place in connection therewith. The term special franchise shall not include property of a municipal corporation or special district, nor shall it include a crossing less than two hundred fifty feet in length of a public street, highway, water or other public place outside a city or village, unless such crossing be the continuation of an occupancy of another public street, highway, water or other public place.

Supreme Court, U.S.
FILED
FEB 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1184

IN THE

Supreme Court of the United States

October Term, 1985

THE BROOKLYN UNION GAS COMPANY,
Petitioner,

against

STATE BOARD OF EQUALIZATION AND ASSESSMENT,
Respondent,

and

THE CITY OF NEW YORK,
Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief for Respondent State Board of Equalization and Assessment in Opposition

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Of Counsel

Dated: February 13, 1986

Question Presented for Review.

Whether a state court of last resort, in reversing a lower court order and dismissing a case in which the record was complete, deprived petitioner of due process of law in not remanding the case for further proceedings and in not discussing why petitioner's testimony regarding the proper valuation theory was insufficient.

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Citations to the Opinions and Judgments Decided in the Courts Below.

The opinion of the New York Court of Appeals is reported at 65 NY2d 472, 492 NYS2d 598 (1985). The opinion of the Appellate Division, Third Department, is reported at 101 AD2d 414, 477 NYS2d 693 (3d Dept, 1984). The opinion of the trial court, Supreme Court, Albany County, dated May 24, 1983 was not reported. Each of the opinions is reproduced in the appendix to the petition.

No. 85-1184

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE BROOKLYN UNION GAS COMPANY,

Petitioner,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Respondent,

and

THE CITY OF NEW YORK,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief for Respondent State Board of Equalization and Assessment in Opposition.

Jurisdiction.

The judgment of the New York State Court of Appeals was entered August 1, 1985. The Court denied petitioner's motion for reargument on October 8, 1985.

The jurisdiction of this Court is allegedly invoked under 28 USC § 1257(3), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The Board contests jurisdiction. Because the decision of the court below rested entirely on adequate and independent state grounds, this Court does not have jurisdiction to issue a writ of certiorari.

Constitutional Provisions Involved.

The Constitution of the United States provides, in pertinent part:

Amendment V:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *"

Amendment XIV:

> "No state shall * * * deprive any person of life, liberty, or property, without due process of law * * *"

Statement of the Case.

Petitioner, a gas utility serving three counties within New York City, maintains extensive special franchise property. A special franchise is the right to maintain facilities within the public right-of-way, and includes the value of the license itself and the tangible property located within the public right-of-way. Real Property Tax Law, § 102(17). Respondent State Board of Equalization and Assessment ("Board") is the state agency responsible for assessing annually all special franchises within the state for purposes of municipal real property taxation. New York Real Property Tax Law, §§ 200, 600. Intervenor-respondent City of New York ("City") is the municipality within which petitioner maintains its special franchises.

This case originated with petitioner's challenge, under Article 7 of the New York Real Property Tax Law, to the final 1980 assessment of its special franchise properties at $497.7 million made by the Board. The trial court heard testimony from three appraisers, two presented by petitioner and one presented by the City. Because the City's appraisal testimony fully supported the Board's assessment, the Board did not present a separate appraisal witness.

The first appraisal witness presented by petitioner, Mr. Green, considered various approaches to determining the fair market value of petitioner's special franchises, including reproduction cost new less depreciation ("RCNLD"). He testified, however, that he gave no credence to the value he derived from his RCNLD approach. Using various other methods, he appraised petitioner's special franchise value at $232.1 million.

Petitioner's second appraisal witness was Julius Breitling, whose appraisal was adopted by the trial court. He determined a special franchise value of $264.4 million by averaging an original cost less depreciation value ("rate base") and a capitalization of net income value. Although Mr. Breitling also used an RCNLD method of determining value, he did not consider it when determining his final value. Mr. Breitling did not include any value for the intangible portion of petitioner's special franchises under any of his approaches. In his RCNLD approach, Mr. Breitling deducted hundreds of millions of dollars for various reasons. The City and the Board objected to the deductions, maintaining there was no legal basis for them.

Jack C. Emery, the City's appraiser, used the RCNLD method of appraising petitioner's special franchises to arrive at a value of $603 million, including $67 million for the intangible value of the franchises. Mr. Emery did not make deductions similar in type or amount to those made by Mr. Breitling and objected to by the Board and the City.

The trial court adopted the value determined by Mr. Breitling and annulled the Board's assessment. In doing so, it held that capitalization of income is a legitimate appraisal method for valuing a special franchise, "especially

when the only evidence in the record is that the system, if reproduced, would not be reproduced in its present form" (25a).[1]

The Appellate Division unanimously affirmed, stating that the existing system "would never be reproduced in its present form but would be replaced with a new completely modern system" (14a). The court also stated that:

> "Since the market data approach could not be considered because of the lack of comparable sales, and the facility could not be considered a specialty since it is unreasonable to conclude that the facility would be replaced on an economic basis [citations omitted], the capitalization of income method used herein provides the most accurate method of determining value [citations omitted]. Moreover, we would reach the same result even if the facility was considered a specialty" (14a).

Petitioner's arguments here make it important to review the contentions put forth below by the Board. In its brief to the Court of Appeals, the Board argued that: (1) functional tangible special franchise property whose use would be reproduced must, as a matter of state law, be valued by using the RCNLD approach; (2) the methods of valuation relied upon by petitioner's appraisers and accepted by the courts below are not proper methods of valuing tangible special franchise property as a matter of state law; (3) the courts below erred, as a matter of state law, in not determining any value for the intangible portion of petitioner's special franchises; (4) the methods used by petitioner's appraisers and relied on by the courts below, even assuming

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[1]Parentheticals refer to pages of petitioner's appendix.

their validity in state law, were not properly applied and therefore generated erroneous values; (5) the RCNLD evidence of appraisal offered by petitioner, but not considered by the courts below, did not support the values found by the courts or justify any reduction in the Board's assessment; and (6) were the Court to disallow the deductions (which were improper as a matter of law) taken under petitioner's RCNLD appraisal, petitioner's RCNLD appraisal supported the Board's assessment. Accordingly, the Board argued that petitioner had failed to overcome the presumption of validity established by New York law for the Board's assessments, and therefore the assessments should stand, the judgment below should be reversed, and the petition should be dismissed.

In a unanimous opinion adopting all of the Board's arguments, the Court of Appeals reversed and dismissed the petition, reinstating the Board's assessment.

Petitioner then moved for reargument, alleging *inter alia,* that the Court had erred in not giving credence to petitioner's RCNLD appraisal and that such an error denied petitioner due process of law by depriving petitioner of "its day in court and the right to further contest the assessment in this judicial proceeding."

The Court of Appeals denied the motion for reargument in a single sentence, making no mention of the constitutional argument (or any others) raised in the motion papers (30a).

Opinion of the Court of Appeals (1a-11a).

The Court of Appeals stated the issue, simply and accurately, as whether the special franchise property owned

by petitioner (and the special franchise property owned by another utility) was specialty property, to be valued for special franchise assessment and taxation purposes by the RCNLD method, or whether a capitalization method of valuation was an acceptable method of valuation for such property (1a). The Court then discussed the proof adduced at trial in this case and in another involving a separate utility which the court had chosen to decide at the same time (1a-7a). (Although the trial records and outcomes in the two cases were quite different, both cases received similar decisions from a state intermediate court, the Appellate Division, Third Department.)

The Court then stated that New York State courts have uniformly held that RCNLD was the appropriate method of valuing the tangible components of special franchise property, citing *People ex rel. Delaware, Lackawanna & W.R.R. Co. v. Clapp,* 152 NY 490 (1897); *People ex rel. Jamaica Water Supply Co. v. State Board of Tax Commissioners,* 196 NY 39 (1909); *Matter of Onondaga County Water District v. Board of Assessors,* 39 NY2d 601 (1976); *Matter of Consolidated Edison Co. v. State Board of Equalization and Assessment,* 101 Misc 2d 910 (Sup Ct, Albany Co, 1979), *mod on other grounds,* 83 AD2d 355 (3d Dept, 1981), *affd,* 58 NY2d 710 (1982). RCNLD is appropriate, the Court said, because special franchise property is considered to be "specialty property" (7a). The Court then discussed the leading case defining specialty property, *Matter of County of Suffolk (C.J. Van Bourgondien, Inc.),* 47 NY2d 507, 512 (1979). A property is a "specialty," said the Court (7a-8a), when it meets four criteria: (a) the improvement must be unique and must be specially built for the specific purpose for which it is designed; (b) there must be a special use for which the improvement is designed and the improvement

must be so specially used; (c) there must be no market for the type of property and no sales of property for such use; and (d) the improvement must be an appropriate improvement at the time of the taking and its use must be economically feasible and reasonably expected to be replaced.

The Court said there was no doubt that the special franchise properties owned by the utilities involved in the two cases before it fully satisfied the first three criteria, and then held that the trial court in the *Brooklyn Union* case and the Appellate Division in both cases had misinterpreted the fourth element on the law when they said that the system "would not be reproduced in its present form" and that it was "unreasonable to conclude that the facility could be replaced on an economic basis" and therefore the property "could not be considered a specialty" (8a). The Court of Appeals said that this requirement relates to the use or function of the property and means that the use or function must be reasonably expected to be replaced; it was not necessary that the material of which it was originally composed be replicated (8a).

The Court then held that the special franchise properties of the utilities in both cases were "specialty properties" and that the proper method of valuing their tangible property is by RCNLD, to which should be added, in order to determine the full value, the value of the intangible franchise (the right to use the public streets and thoroughfares for the placement of their tangible property), arrived at by capitalization-of-income, where there exists excess income, or by adding 5% of the value of the tangible real property where there is no excess income (11a).

The Court therefore reversed the Appellate Division order in *Brooklyn Union*, dismissed the petition, and

reinstated the State Board's assessment. The Court also reversed the Appellate Division order in the other case and reinstated the judgment of the trial court dismissing the petition (11a).

REASONS FOR DENYING THE WRIT.

The petition should be denied for want of a substantial federal question.

Petitioner argues that the Court of Appeals denied it due process in two ways: in dismissing rather than remanding the case, and in not discussing why petitioner's RCNLD testimony was insufficient. It claims it was therefore deprived of any opportunity for a factual hearing and a ruling on the merits of its RCNLD testimony (Pet, pp 4, 9, 21).

Petitioner *had* its opportunity for a hearing at the trial level where it put in RCNLD testimony. However, it so misapplied the methodology that petitioner failed to overcome the strong presumption of validity New York law attaches to the Board's assessments under the *Jamaica Water Supply Co.* case, 196 NY at 53. Under New York law, a taxpayer cannot sustain its burden of proving overassessment with improper appraisals or even by improperly applying proper methods. E.g., *Matter of the City of New York (Atlantic Improvement Corp.)*, 28 NY2d 465, 472 (1971). The Court of Appeals decision to dismiss rather than remand merely means that, in the judgment of the Court of Appeals, petitioner failed to carry its burden and overcome the presumption of validity.

No purpose would have been served by a remand. Petitioner is correct that the Court of Appeals did not review any questions of fact because of the limitations of its jurisdiction, but that is beside the point. Use of an erroneous theory of valuation involves a question of law; whether the record contains evidence adequate to support a trial court's findings of fact is also a question of law. *Matter of B. Altman & Co. v. City of White Plains*, 57 NY2d 904, 905-906 (1982); *Matter of Seagram & Sons v. Tax Commission of City of New York*, 14 NY2d 314, 317 (1964). Both questions were therefore reviewable by the Court of Appeals. *Ibid.*

Surely the Court of Appeals was aware of petitioner's appraisal testimony on RCNLD even though the decision does not explicitly refer to it. The parties thoroughly discussed the testimony in their briefs to the Court of Appeals (Pet Br, pp 32-36, 81-85, 87-89; Board's Br, pp 12, 14, 54-62; Board's Reply Br, pp 12-14); it was discussed at even greater length in the motion for reargument (Pet Br, pp. 1-19, 22). As this Court no doubt knows, the opinions rendered in a particular case do not, and need not, mention every fact and contention pressed by the parties. The Court's opinion did mention the RCNLD testimony put forth by the City and joined in by the Board (3a, 4a).

The cases cited by petitioner (at pp 13-16) for the proposition that the Court of Appeals treated petitioner differently from other taxpayers in the past merely indicate that the Court can remand cases for further fact-finding where that is necessary because of the incompleteness of the record in a particular case, which is *not* the case here. There was extensive testimony on RCNLD valuation in this case. Under such circumstances, remand was unnecessary and dismissal was appropriate.

It is clear, therefore, that the decision of the court below rested entirely on adequate and independent state grounds, not federal grounds. This Court has long adhered to the doctrine that it will not review judgments of state courts which rest upon adequate and independent state grounds. *Florida v. Casal and Garcia*, 462 US 637 (1983) (Burger, C.J., concurring); *Herb v. Pitcairn*, 324 US 117, 126 (1945); *Klinger v. Missouri*, 80 US 257 (1872).

This is precisely the kind of situation to which the rule applies. The case was briefed, argued, and decided on issues of state law. Petitioner's imploration to this Court is not based on any misapplication of federal law by the court below. The decision below turned entirely on questions of state law, *i.e.*, whether RCNLD is, under New York law, the proper method of valuing special franchise property for municipal real property taxation purposes and whether petitioner's evidence was insufficient, as a matter of law, to support its claims. These are questions of local, not national importance.

Petitioner's belated attempt to interject a federal question in its post-decision motion for reargument to the State's highest court does not convert either the state law issue into a federal one or the Court's dismissal of the case into a federal rights issue. Not surprisingly, petitioner is unable to cite *any* instance of this Court reviewing a state court judgment involving issues of state law where the "federal question" raised by petitioner consisted merely of naked allegations that the state court denied petitioner due process of law by reversing on the law and dismissing the case. Petitioner received the process which was its due in pressing its claims before three levels of state courts. The Court of Appeals agreed with the Board that the record was sufficiently complete and therefore properly dismissed the petition rather than remanding it.

Petitioner has not demonstrated any special and important reasons for granting certiorari. The case does not even remotely qualify for consideration of certiorari under Rule 17 of this Court's Rules. The court below did not decide a "federal question in a way in conflict with the decision of another state court of last resort or a federal court of appeals" nor did it decide "an important question of federal law which has not been, but should be settled by this Court" nor "in a way in conflict with applicable decisions of this Court". Rule17, subd 1(b), (c). It did not "decide" a federal question at all, much less one of importance or in conflict with other appellate courts. On its face, the petition is defective and the writ should be denied.[2]

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[2]Even the Court's summary denial of petitioner's motion for reargument did not constitute a decision on a federal question. See *Radio Station WOW v. Johnson*, 326 US 120, 128 (1945). And petitioner cannot legitimately claim that the Court of Appeals ruling could not have been anticipated, given the long line of cases (discussed in the briefs by the Board and the City and in the opinion by the Court of Appeals) upholding RCNLD as the appropriate methodology for assessing special franchise property for real property taxation purposes in New York State, and thus come within the limited situation where raising a federal question for the first time in a petition for rehearing to the State's highest court will suffice to raise a substantial federal question for this Court's consideration because the lower court ruling was unanticipated. *Herndon v. Georgia*, 295 US 441 (1935).

CONCLUSION.

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
February 13, 1986

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(3)

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No. 85-1184

IN THE

Supreme Court of the United States

October Term, 1985

THE BROOKLYN UNION GAS COMPANY,
Petitioner,

against

STATE BOARD OF EQUALIZATION AND ASSESSMENT,
Respondent,

and

THE CITY OF NEW YORK,
Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief for Respondent State Board of Equalization and Assessment in Opposition

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Dated: February 13, 1986

20 pp

Question Presented for Review.

Whether a state court of last resort, in reversing a lower court order and dismissing a case in which the record was complete, deprived petitioner of due process of law in not remanding the case for further proceedings and in not discussing why petitioner's testimony regarding the proper valuation theory was insufficient.

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Citations to the Opinions and Judgments Decided in the Courts Below.

The opinion of the New York Court of Appeals is reported at 65 NY2d 472, 492 NYS2d 598 (1985). The opinon of the Appellate Division, Third Department, is reported at 101 AD2d 414, 477 NYS2d 693 (3d Dept, 1984). The opinion of the trial court, Supreme Court, Albany County, dated May 24, 1983 was not reported. Each of the opinions is reproduced in the appendix to the petition.

No. 85-1184

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE BROOKLYN UNION GAS COMPANY,

Petitioner,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Respondent,

and

THE CITY OF NEW YORK,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief for Respondent State Board of Equalization and Assessment in Opposition.

Jurisdiction.

The judgment of the New York State Court of Appeals was entered August 1, 1985. The Court denied petitioner's motion for reargument on October 8, 1985.

The jurisdiction of this Court is allegedly invoked under 28 USC § 1257(3), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The Board contests jurisdiction. Because the decision of the court below rested entirely on adequate and independent state grounds, this Court does not have jurisdiction to issue a writ of certiorari.

Constitutional Provisions Involved.

The Constitution of the United States provides, in pertinent part:

Amendment V:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *"

Amendment XIV:

> "No state shall * * * deprive any person of life, liberty, or property, without due process of law * * *"

Statement of the Case.

Petitioner, a gas utility serving three counties within New York City, maintains extensive special franchise property. A special franchise is the right to maintain facilities within the public right-of-way, and includes the value of the license itself and the tangible property located within the public right-of-way. Real Property Tax Law, § 102(17). Respondent State Board of Equalization and Assessment ("Board") is the state agency responsible for assessing annually all special franchises within the state for purposes of municipal real property taxation. New York Real Property Tax Law, §§ 200, 600. Intervenor-respondent City of New York ("City") is the municipality within which petitioner maintains its special franchises.

This case originated with petitioner's challenge, under Article 7 of the New York Real Property Tax Law, to the final 1980 assessment of its special franchise properties at $497.7 million made by the Board. The trial court heard testimony from three appraisers, two presented by petitioner and one presented by the City. Because the City's appraisal testimony fully supported the Board's assessment, the Board did not present a separate appraisal witness.

The first appraisal witness presented by petitioner, Mr. Green, considered various approaches to determining the fair market value of petitioner's special franchises, including reproduction cost new less depreciation ("RCNLD"). He testified, however, that he gave no credence to the value he derived from his RCNLD approach. Using various other methods, he appraised petitioner's special franchise value at $232.1 million.

Petitioner's second appraisal witness was Julius Breitling, whose appraisal was adopted by the trial court. He determined a special franchise value of $264.4 million by averaging an original cost less depreciation value ("rate base") and a capitalization of net income value. Although Mr. Breitling also used an RCNLD method of determining value, he did not consider it when determining his final value. Mr. Breitling did not include any value for the intangible portion of petitioner's special franchises under any of his approaches. In his RCNLD approach, Mr. Breitling deducted hundreds of millions of dollars for various reasons. The City and the Board objected to the deductions, maintaining there was no legal basis for them.

Jack C. Emery, the City's appraiser, used the RCNLD method of appraising petitioner's special franchises to arrive at a value of $603 million, including $67 million for the intangible value of the franchises. Mr. Emery did not make deductions similar in type or amount to those made by Mr. Breitling and objected to by the Board and the City.

The trial court adopted the value determined by Mr. Breitling and annulled the Board's assessment. In doing so, it held that capitalization of income is a legitimate appraisal method for valuing a special franchise, "especially

when the only evidence in the record is that the system, if reproduced, would not be reproduced in its present form" (25a).[1]

The Appellate Division unanimously affirmed, stating that the existing system "would never be reproduced in its present form but would be replaced with a new completely modern system" (14a). The court also stated that:

> "Since the market data approach could not be considered because of the lack of comparable sales, and the facility could not be considered a specialty since it is unreasonable to conclude that the facility would be replaced on an economic basis [citations omitted], the capitalization of income method used herein provides the most accurate method of determining value [citations omitted]. Moreover, we would reach the same result even if the facility was considered a specialty" (14a).

Petitioner's arguments here make it important to review the contentions put forth below by the Board. In its brief to the Court of Appeals, the Board argued that: (1) functional tangible special franchise property whose use would be reproduced must, as a matter of state law, be valued by using the RCNLD approach; (2) the methods of valuation relied upon by petitioner's appraisers and accepted by the courts below are not proper methods of valuing tangible special franchise property as a matter of state law; (3) the courts below erred, as a matter of state law, in not determining any value for the intangible portion of petitioner's special franchises; (4) the methods used by petitioner's appraisers and relied on by the courts below, even assuming

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[1]Parentheticals refer to pages of petitioner's appendix.

their validity in state law, were not properly applied and therefore generated erroneous values; (5) the RCNLD evidence of appraisal offered by petitioner, but not considered by the courts below, did not support the values found by the courts or justify any reduction in the Board's assessment; and (6) were the Court to disallow the deductions (which were improper as a matter of law) taken under petitioner's RCNLD appraisal, petitioner's RCNLD appraisal supported the Board's assessment. Accordingly, the Board argued that petitioner had failed to overcome the presumption of validity established by New York law for the Board's assessments, and therefore the assessments should stand, the judgment below should be reversed, and the petition should be dismissed.

In a unanimous opinion adopting all of the Board's arguments, the Court of Appeals reversed and dismissed the petition, reinstating the Board's assessment.

Petitioner then moved for reargument, alleging *inter alia,* that the Court had erred in not giving credence to petitioner's RCNLD appraisal and that such an error denied petitioner due process of law by depriving petitioner of "its day in court and the right to further contest the assessment in this judicial proceeding."

The Court of Appeals denied the motion for reargument in a single sentence, making no mention of the constitutional argument (or any others) raised in the motion papers (30a).

Opinion of the Court of Appeals (1a-11a).

The Court of Appeals stated the issue, simply and accurately, as whether the special franchise property owned

by petitioner (and the special franchise property owned by another utility) was specialty property, to be valued for special franchise assessment and taxation purposes by the RCNLD method, or whether a capitalization method of valuation was an acceptable method of valuation for such property (1a). The Court then discussed the proof adduced at trial in this case and in another involving a separate utility which the court had chosen to decide at the same time (1a-7a). (Although the trial records and outcomes in the two cases were quite different, both cases received similar decisions from a state intermediate court, the Appellate Division, Third Department.)

The Court then stated that New York State courts have uniformly held that RCNLD was the appropriate method of valuing the tangible components of special franchise property, citing *People ex rel. Delaware, Lackawanna & W.R.R. Co. v. Clapp,* 152 NY 490 (1897); *People ex rel. Jamaica Water Supply Co. v. State Board of Tax Commissioners,* 196 NY 39 (1909); *Matter of Onondaga County Water District v. Board of Assessors,* 39 NY2d 601 (1976); *Matter of Consolidated Edison Co. v. State Board of Equalization and Assessment,* 101 Misc 2d 910 (Sup Ct, Albany Co, 1979), *mod on other grounds,* 83 AD2d 355 (3d Dept, 1981), *affd,* 58 NY2d 710 (1982). RCNLD is appropriate, the Court said, because special franchise property is considered to be "specialty property" (7a). The Court then discussed the leading case defining specialty property, *Matter of County of Suffolk (C.J. Van Bourgondien, Inc.),* 47 NY2d 507, 512 (1979). A property is a "specialty," said the Court (7a-8a), when it meets four criteria: (a) the improvement must be unique and must be specially built for the specific purpose for which it is designed; (b) there must be a special use for which the improvement is designed and the improvement

must be so specially used; (c) there must be no market for the type of property and no sales of property for such use; and (d) the improvement must be an appropriate improvement at the time of the taking and its use must be economically feasible and reasonably expected to be replaced.

The Court said there was no doubt that the special franchise properties owned by the utilities involved in the two cases before it fully satisfied the first three criteria, and then held that the trial court in the *Brooklyn Union* case and the Appellate Division in both cases had misinterpreted the fourth element on the law when they said that the system "would not be reproduced in its present form" and that it was "unreasonable to conclude that the facility could be replaced on an economic basis" and therefore the property "could not be considered a specialty" (8a). The Court of Appeals said that this requirement relates to the use or function of the property and means that the use or function must be reasonably expected to be replaced; it was not necessary that the material of which it was originally composed be replicated (8a).

The Court then held that the special franchise properties of the utilities in both cases were "specialty properties" and that the proper method of valuing their tangible property is by RCNLD, to which should be added, in order to determine the full value, the value of the intangible franchise (the right to use the public streets and thoroughfares for the placement of their tangible property), arrived at by capitalization-of-income, where there exists excess income, or by adding 5% of the value of the tangible real property where there is no excess income (11a).

The Court therefore reversed the Appellate Division order in *Brooklyn Union*, dismissed the petition, and

reinstated the State Board's assessment. The Court also reversed the Appellate Division order in the other case and reinstated the judgment of the trial court dismissing the petition (11a).

REASONS FOR DENYING THE WRIT.

The petition should be denied for want of a substantial federal question.

Petitioner argues that the Court of Appeals denied it due process in two ways: in dismissing rather than remanding the case, and in not discussing why petitioner's RCNLD testimony was insufficient. It claims it was therefore deprived of any opportunity for a factual hearing and a ruling on the merits of its RCNLD testimony (Pet, pp 4, 9, 21).

Petitioner *had* its opportunity for a hearing at the trial level where it put in RCNLD testimony. However, it so misapplied the methodology that petitioner failed to overcome the strong presumption of validity New York law attaches to the Board's assessments under the *Jamaica Water Supply Co.* case, 196 NY at 53. Under New York law, a taxpayer cannot sustain its burden of proving overassessment with improper appraisals or even by improperly applying proper methods. E.g., *Matter of the City of New York (Atlantic Improvement Corp.)*, 28 NY2d 465, 472 (1971). The Court of Appeals decision to dismiss rath than remand merely means that, in the judgment of the Court of Appeals, petitioner failed to carry its burden and overcome the presumption of validity.

No purpose would have been served by a remand. Petitioner is correct that the Court of Appeals did not review any questions of fact because of the limitations of its jurisdiction, but that is beside the point. Use of an erroneous theory of valuation involves a question of law; whether the record contains evidence adequate to support a trial court's findings of fact is also a question of law. *Matter of B. Altman & Co. v. City of White Plains*, 57 NY2d 904, 905-906 (1982); *Matter of Seagram & Sons v. Tax Commission of City of New York*, 14 NY2d 314, 317 (1964). Both questions were therefore reviewable by the Court of Appeals. *Ibid.*

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The cases cited by petitioner (at pp 13-16) for the proposition that the Court of Appeals treated petitioner differently from other taxpayers in the past merely indicate that the Court can remand cases for further fact-finding where that is necessary because of the incompleteness of the record in a particular case, which is *not* the case here. There was extensive testimony on RCNLD valuation in this case. Under such circumstances, remand was unnecessary and dismissal was appropriate.

It is clear, therefore, that the decision of the court below rested entirely on adequate and independent state grounds, not federal grounds. This Court has long adhered to the doctrine that it will not review judgments of state courts which rest upon adequate and independent state grounds. *Florida v. Casal and Garcia*, 462 US 637 (1983) (Burger, C.J., concurring); *Herb v. Pitcairn*, 324 US 117, 126 (1945); *Klinger v. Missouri*, 80 US 257 (1872).

This is precisely the kind of situation to which the rule applies. The case was briefed, argued, and decided on issues of state law. Petitioner's imploration to this Court is not based on any misapplication of federal law by the court below. The decision below turned entirely on questions of state law, *i.e.*, whether RCNLD is, under New York law, the proper method of valuing special franchise property for municipal real property taxation purposes and whether petitioner's evidence was insufficient, as a matter of law, to support its claims. These are questions of local, not national importance.

Petitioner's belated attempt to interject a federal question in its post-decision motion for reargument to the State's highest court does not convert either the state law issue into a federal one or the Court's dismissal of the case into a federal rights issue. Not surprisingly, petitioner is unable to cite *any* instance of this Court reviewing a state court judgment involving issues of state law where the "federal question" raised by petitioner consisted merely of naked allegations that the state court denied petitioner due process of law by reversing on the law and dismissing the case. Petitioner received the process which was its due in pressing its claims before three levels of state courts. The Court of Appeals agreed with the Board that the record was sufficiently complete and therefore properly dismissed the petition rather than remanding it.

Petitioner has not demonstrated any special and important reasons for granting certiorari. The case does not even remotely qualify for consideration of certiorari under Rule 17 of this Court's Rules. The court below did not decide a "federal question in a way in conflict with the decision of another state court of last resort or a federal court of appeals" nor did it decide "an important question of federal law which has not been, but should be settled by this Court" nor "in a way in conflict with applicable decisions of this Court". Rule17, subd 1(b), (c). It did not "decide" a federal question at all, much less one of importance or in conflict with other appellate courts. On its face, the petition is defective and the writ should be denied.[2]

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[2]Even the Court's summary denial of petitioner's motion for reargument did not constitute a decision on a federal question. See *Radio Station WOW v. Johnson*, 326 US 120, 128 (1945). And petitioner cannot legitimately claim that the Court of Appeals ruling could not have been anticipated, given the long line of cases (discussed in the briefs by the Board and the City and in the opinion by the Court of Appeals) upholding RCNLD as the appropriate methodology for assessing special franchise property for real property taxation purposes in New York State, and thus come within the limited situation where raising a federal question for the first time in a petition for rehearing to the State's highest court will suffice to raise a substantial federal question for this Court's consideration because the lower court ruling was unanticipated. *Herndon v. Georgia*, 295 US 441 (1935).

CONCLUSION.

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
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No. 85-1184

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE BROOKLYN UNION GAS COMPANY,

Petitioner,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Respondent,

and

THE CITY OF NEW YORK,

Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

ARGUMENT

The replies by the State Board of Equalization and Assessment and by The City of New York ignore the public interest here and petitioner's position that due process of law required a ruling on the merits of its RCNLD evidence by the courts below.

I. The issue here impacts millions of people and the availability of judicial remedies in New York.

The issue here is not one of a local tax proceeding or of an issue involving only a mass of factual material (City Br. at 13). It is a question of whether four million gas users, a large percentage living at the poverty level, and the company that serves them are entitled to have a hearing on whether their gas bills were burdened by illegal taxes because of SBEA over-valuation.

The New York State Public Service Commission advised our Court of Appeals of the public interest in this case, noting that the taxes at issue here "represent a significant portion of utility consumers' gas . . . bills." The Public Service Commission told the court of its policy to flow large tax refunds through to utility ratepayers. It noted also that ratepayers would "continue to benefit from a ruling requiring tax refunds [by] . . . lower future utility bills. There is no question, therefore, that Brooklyn Union's ratepayers would benefit from an affirmance of the Appellate Division's decision." (P.S.C. *Amicus* Brief to Court of Appeals at 6, 7).

Under the guise of arguing that no important question exists, the City, but not the SBEA, proffers the incredible argument that the "SBEA itself has described every element of the valuation process in its exhaustive compendium of Rules."[1] (City Brief at 12). The trial court lamented that it was "totally in the dark upon the central issue it is required to decide, i.e., 'whether the SBEA assessment method was correct in form and application'." (Appendix at 23a). Nowhere does the City tell this Court that there were no Rules when these assessments were made and none when this case was tried. Only in December 1983 when review was pending before the Appellate Division did SBEA

[1] This "exhaustive compendium" fails to disclose, for example, the basis for discrimination that was discosed by an SBEA supervisor in testimony at a separate subsequent special franchise trial. There he acknowledged that during years from 1975 to 1980 other gas distribution companies in New York, some with mains in the same streets, received depreciation treatment that was 33 1/3% to 66 2/3% greater than that accorded to Brooklyn Union. The witness could offer no factual or physical reason for the vast difference and he acknowledged that no engineering analyses were performed. *Brooklyn Union v. SBEA* (1975/76-79/80 tax years) Transcript of Trial before Hon. DeForest Pitt at V.XIII, 1274-75, 1287-88, 1314. This absurd and punitive result could not be explained by a senior SBEA official and under no conceivable circumstances could these "Rules" at 9 N.Y.C.R.R., Part 197.3 have reflected SBEA practices.

adopt Rules. These so-called Rules are not "the equivalent of a text book on the subject" (City Brief at 12); these Rules were an after-the-fact act of SBEA and they are even now under legal challenge by others.

As a separate and significant consideration, if Brooklyn Union can not obtain review of its assessments even when it has followed established procedural rules and presented evidence under the Court of Appeals RCNLD theory, that may signal to lower courts and to practitioners a judicial fiat that legal options no longer exist. Hereafter, in the absence of corrective action by this Court, one coming to New York courts may be at peril in offering alternative evidentiary presentations even if one of them is the correct approach.

II. Petitioner asks only to have its case heard on the merits.

The SBEA begins its opposing brief by references to Amendment V and to Amendment XIV. Both are urged by Brooklyn Union here as a legal basis to support its position that the dismissal on rehearing by the Court of Appeals was constitutionally infirm once that court had been told that it had ignored Brooklyn Union's RCNLD appraisal. In most simple terms, Brooklyn Union's RCNLD evidence was not ruled upon by any of the courts of New York State even though it is the very legal basis which the Court of Appeals has told us is the law of valuation in New York State.[2] The SBEA never offered an appraisal. It

[2] The Court of Appeals decision suggests that reproduction cost new less depreciation (RCNLD) has been the approved method of valuation in this State for many years. However, the last decided case on the valuation of special franchise (utility) property to pass through our courts did so more than a quarter of a century ago and there the SBEA itself used original cost, not RCNLD as a basis of valuing utility property. *Staten Island Edison Corp. v. Moore,* 6 A.D.2d 369, 177 N.Y.S.2d 129 (3d Dep't 1958), *reversing,* 6 Misc. 2d 1031, 164 N.Y.S.2d 772 (Sup. Ct. Albany County, 1955), *aff'd after remand,* 15 A.D.2d 983, 225 N.Y.S.2d 520 (3d Dep't), *aff'd,* 12 N.Y.2d 846, 236 N.Y.S.2d 624

(footnote continued on following page)

presented no witness. It had no Rules. The court was provided no evidence of the SBEA's appraisal process. To this day we have not one shred of evidence on what valuation method the SBEA followed here. Brooklyn Union was entitled to such a ruling because it was the *only* party in the case to offer the required RCNLD evidence. It presented all known alternative valuation theories at trial. The trial judge never reached the RCNLD evidence; he reached his decision without commenting on petitioner's RCNLD valuation or weighing it or in any way utilizing it.

The intermediate appellate court, the Appellate Division, reviewed this case and unanimously affirmed the trial judge. It had the entire record to review but found no reason or basis for considering Brooklyn Union's RCNLD evidence and it did not. It too concluded that the only opposing expert, Mr. Emery, lacked qualifications as an expert. The Appellate Division is our highest fact-finding court.

The City and State Board have argued that New York's highest court, the Court of Appeals, gave full consideration to Brooklyn Union's RCNLD appraisal. As that court is not a fact-finding court, one wonders how it could have done so. The Court of Appeals has never acknowledged that Brooklyn Union had submitted a RCNLD appraisal.

The Court of Appeals has declared its interpretation of the law of special franchise valuation. In so doing, that court has simply ignored that Brooklyn Union presented a case in full compliance with that interpertation. No court has considered Brooklyn Union's RCNLD case. No court

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(*footnote continued from preceding page*)

(1962). Only four years ago the Court of Appeals in a companion special franchise certiorari proceeding declined to advise Brooklyn Union that RCNLD was the "long accepted rule." *Consolidated Edison Co. v. SBEA*, 58 N.Y.2d 710, 458 N.Y.S.2d 967 (1982).

has rejected Brooklyn Union's RCNLD case. No court has received any credible opposing RCNLD evidence. It should be abundantly clear that until Brooklyn Union's RCNLD case has been heard and ruled upon, Brooklyn Union and its four million consumers have been deprived of their rights to due process under Amendment V and Amendment XIV of the Constitution.

The Question Presented as stated by the City response does not resemble the grievance pressed by the petitioner. The City has ignored the basic due process issues presented and it questions, not the existence, but the quality, of petitioner's RCNLD evidence. The City attacks the quality of RCNLD evidence with accusations that it "deviated significantly from the method customarily denoted RCNLD" (City Brief at 3) or that it was "a thinly disguised version intended to bolster its 'capitalization method'." (City Brief at 7). The City suggests that Brooklyn Union decries "the lack of a line-by-line critique of its valuation solecisms . . . by the Court of Appeals itself." (City Brief at 9). It says there is no requirement that a court "educate a party, least of all with respect to questions of fact." (City Brief at 9). We agree that our highest court has no obligation to educate on the facts. Brooklyn Union only asks that a New York court evaluate its RCNLD evidence. Its contention is that not one of the three courts below ever looked at or ruled on the merits of its RCNLD evidence.

Because of an error of law, the trial judge and the Appellate Division found overvaluation on the wrong legal theory. Both of those courts looked at but one of the two factual presentations which petitioner had made. They had no need to review or rule on the RCNLD since it was not essential to their conclusion that the property had been substantially overassessed. Both courts did look at, and rejected, the City's and the SBEA's only evidence. That RCNLD testimony and appraisal was rejected because

of lack of qualification of the expert and fatal flaws in his appraisal report.

Neither court ever made any use of petitioner's RCNLD evidence. They did not reject it, they did not approve it, they did not evaluate it. Both fact-finding courts ignored it: the trial court because it chose a legal theory amply supported by other evidence; the Appellate Division because it affirmed on the same erroneous legal theory. The trial judge never once mentioned Brooklyn Union's RCNLD appraisal. The Appellate Division never discussed its existence. The Court of Appeals has never acknowledged that petitioner's evidence included a full RCNLD appraisal.

In New York, the lower courts have the duty to make findings of fact and conclusions of law. Our highest court deals with law alone. Thus, when the Court of Appeals said that RCNLD applies to this property it was obliged to consider the entire record and recognize that the petitioner had provided detailed RCNLD appraisal evidence and was entitled to a ruling on the merits of that case.

Until the Court of Appeals was advised that this evidence had never been considered, there may not have been a consitutional issue.[3] When it was advised that evidence on its own approved theory was offered but not considered—then the right to be heard arose and its denial of that right was a constitutional deprivation. There is no question that Brooklyn Union had the opportunity to offer its evidence at trial. The problem is that its RCNLD evidence was never considered and ruled upon by any New York court.

Both SBEA and the City briefs take pains to obscure this fact by discussing the opportunity which petitioner had in

[3] In the companion *National Fuel* case, 65 N.Y.2d 472, 492 N.Y.S.2d 598 (1985), the trial court had weighed RCNLD evidence and held *against* that different petitioner. Here, since the lower courts found for petitioner on a separate theory, they never considered its RCNLD evidence.

these proceedings to present evidence. Yet even the SBEA brief acknowledges openly that "the RCNLD evidence of appraisal offered by petitioner [was] not considered by the courts below." (SBEA Brief at 6). That is exactly why the petitioner has been denied its right to be heard.

This is not a case where "insufficient consideration was given to certain elements of the evidence and testimony received and heard;" (City Brief at 8) the SBEA admits that Brooklyn Union's RCNLD appraisal was not considered at all. Consideration of petitioner's RCNLD evidence was not necessary or warranted until the Court of Appeals reversed the two lower courts on the law. At that point, the RCNLD evidence and testimony, until then an unweighed alternative, demanded judicial consideration by the New York courts.

CONCLUSION

For the reasons stated in the Petition and in this Reply, Brooklyn Union asks to be heard by this Court.

Respectfully submitted,

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